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DATE: November 10, 2003

MEMORANDUM TO: James J. Jochum
Assistant Secretary
for Import Administration

FROM: Holly A. Kuga
Acting Deputy Assistant Secretary
for Import Administration
Group II

SUBJECT: Issues and Decision Memorandum for the Final Results of the Seventh Antidumping Duty Administrative Review: Canned Pineapple Fruit from Thailand

Summary

We have analyzed the case and rebuttal briefs of interested parties for the final results of the antidumping duty review covering canned pineapple fruit (CPF) from Thailand. We received comments from the petitioners[1] and certain respondents. We recommend that you approve the positions we have developed in the Department Position sections of this memorandum.

Background

On June 27, 2003, the Department of Commerce (the Department) published the Preliminary Results of the Seventh Antidumping Duty Administrative Review of CPF from Thailand.[2] The period of review (POR) is July 1, 2001 through June 30, 2002. The respondents in this case are:

- Vita Food Factory (1989) Co., Ltd. (Vita);
- Kuiburi Fruit Canning Co., Ltd. (Kuiburi);

[1] The petitioners in this case are Maui Pineapple Company and the International Longshoremen's and Warehousemen's Union.

[2] *See Notice of Preliminary Results, Partial Rescission of Antidumping Duty Administrative Review, and Preliminary Determination To Not Revoke Order in Part: Canned Pineapple Fruit From Thailand*, 68 FR 38291 (June 27, 2003) (*POR7 Preliminary Results*).

- Malee Sampran Public Co., Ltd. (Malee);
- The Thai Pineapple Public Co., Ltd. (TIPCO);
- Thai Pineapple Canning Industry (TPC);
- Dole Food Company, Inc., Dole Packaged Foods Company, and Dole Thailand, Ltd. (collectively, Dole); and
- Siam Fruit Canning (1988) Co., Ltd. (SIFCO).

On October 4, 2002, in response to the Department's questionnaire, Prachuab Fruit Canning Company (Praft) stated that it made no shipments of subject merchandise to the United States during the POR. We gave interested parties an opportunity to comment on the *POR7 Preliminary Results.* On July 28, 2003, we received case briefs from Dole, TPC, Malee, and the petitioners. On August 4, 2003, we received rebuttal briefs from the petitioners and Dole. We received rebuttal comments from Kuiburi on August 8, 2003.[3] SIFCO also submitted a purported case brief on July 28, 2003, but it was rejected by the Department for containing entirely new factual information.[4]

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[3] Kuiburi was granted permission to submit rebuttal comments, (*See* Comments on Petitioner's Case Brief for the Preliminary Results of the Seventh Administrative Review (Kuiburi's Rebuttal Brief) (August 8, 2003)) late due to a delay in receipt of the petitioners' brief regarding the company. *See* Letter to Mr. Boonmapajorn from Charles Riggle (August 18, 2003). *See also* Letter to Mr. Riggle from Somkiat Chavalitvorakul (August 19, 2003)/ However, Kuiburi's Rebuttal Brief contained a comment, (*See* Section II at pages 2 and 3), that was not a rebuttal to any comment in the petitioners' brief as required by the Department's regulations. Under section 351.309(c)(2) of the Department's regulations "{t}he rebuttal brief may respond only to arguments raised in case briefs and should identify the arguments to which it is responding." Therefore, we will accept Section I of the Kuiburi's Rebuttal Brief which meets our statutory requirements, but will reject the argument in Section II of the Kuiburi's Rebuttal Brief.

[4] *See* Letter to Mr. Prayut Visutvatanasak from Gary Taverman, Director, Office 5, Import Administration (July 30, 2003).

Discussion of Issues

VII. ISSUES SPECIFIC TO DOLE

Comment 1: Comparison Market

The petitioners argue that Dole did not report the proper comparison market. They contend that Thailand, not Canada, is the proper comparison market. Dole counters that it appropriately reported Canada as the comparison market. Dole argues that, conforming with the statute[5] as well as Department and judicial precedent, it properly classified and reported its home market sales. Nowhere in their argument, contends Dole, do the petitioners demonstrate that their characterization of the factual record falls within the statutory definition of sales "for consumption in the exporting country." Due to the proprietary nature of the information related to this issue, this comment is addressed in greater detail in the Analysis Memorandum for Dole Food Company, Dole Packaged Foods, and Dole Thailand (Dole Analysis Memorandum), dated concurrently with this notice, on file in the Central Records Unit (CRU).

Department's Position:

The Department has determined that Dole reported the proper comparison market. Under section 773(a)(1)(B)(i) of the Tariff Act of 1930, as amended (the Act), home market sales are those that are for "consumption in the exporting country." Under the Department's practice, affirmed by the Court of International Trade (CIT),[6] it is necessary to examine not only a respondent's books and records, but also all the circumstances and facts surrounding the sales to determine if a respondent knew, or should have known, that sales made in the domestic market were for consumption in the home market. Based on an examination of the record evidence, the Department concludes that Dole knew that the sales in question were not for consumption in the home market due to its actual knowledge of the CPF market

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[5] Dole cites section 773(a)(1)(B) of the Act as defining home market sales as sales "for consumption in the exporting country." *See* Dole's Rebuttal Brief on Preliminary Results of Review (August 4, 2003) at 5 (Dole's Rebuttal Brief).

[6] *See* section 773(a)(1)(B) of the Act and *INA Walzlager Schaeffler KG v. United States* (*INA*), 957 F. Supp. 251 263 (CIT 1997).

in Thailand and of its customers. For a full discussion of the Department's position, which contains proprietary data, see the Dole Analysis Memorandum. Therefore, we find that Dole properly excluded the sales at issue from its home market aggregate sales quantity. Excluding these sales, Dole's sales to Thailand were fewer than 5 percent of the aggregate quantity of the subject merchandise sold in or for export to the United States.[7] Therefore, in accordance with sections 773(a)(I)(B)(i) and 773(a)(I)(C)(ii) of the Act, we find that Dole does not have a viable home market. We find that Canada is Dole's proper comparison market[8] in the instant review.

Comment 2: Third-Party Verification

The petitioners argue that the Department's verification of a third party was inappropriate. Dole argues that it is at the Department's discretion how and whom to verify. It further states that the verification is not unprecedented and that the results of the verification should be considered for the final results. Due to the proprietary nature of the information related to this issue, this comment is addressed in greater detail in the Dole Analysis Memorandum**.**

Department's Position:

The Department finds that it was within its discretion to conduct a third-party verification. *See* Maui Pineapple Co. *v*. United States, 264 F. Supp. 1244, 1259 (CIT 2003). *See also Notice of Final Determination of Sales at Less than Fair Value: Stainless Steel Plates in Coils from Taiwan* (*Coils from Taiwan),* 64 FR 15493 (March 31, 1999). Consequently, the findings at this verification have been considered for the final results. For a full discussion of the Department's position, which contains proprietary information, see the Dole Analysis Memorandum**.**

Comment 3: Use of Facts Available

The petitioners argue that verification confirmed that Thailand was a viable home market. Since verification found that the sales discussed in Comment 1 above were domestic sales, the petitioners assert that a third-market country (*i.e.,* Canada) cannot be used as a comparison market in this review. Further, the petitioners contend, the Department must infer that Dole Thailand's refusal to report Thailand as its comparison market was a deliberate and calculated action. Since Dole Thailand failed to cooperate, by not supplying a Thai database, the Department must, according to the petitioners, resort to adverse facts available.

In support of this argument, the petitioners cite sections 776(c) and 782(c)(1) of the Act as well as section 351.308(a) of the Department's regulations, which outline when the Department uses facts available. The petitioners state that Dole Thailand clearly failed to cooperate since it was able to, but

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[7] *See* Dole's Section A questionnaire response (October 23, 2002) at Exhibit A-1.

[8] *See* Dole's Section A questionnaire response (October 23, 2002) at Exhibit A-1.

did not submit, a Thai database and Section B response for home market sales. Instead, the petitioners claim, Dole "attempted to cover up"[9] Thailand's viability and force the Department to use Canadian sales for normal value (NV).

Working on the assumption that Thailand is the correct comparison market, the petitioners highlight the various places in the questionnaire and supplemental questionnaires[10] where the Department asked questions regarding Dole's home market sales. They maintain that Dole had months to provide the information requested and, as its counsel has prior antidumping experience, there could have been no misunderstanding of the Department's instructions and practices. The only way to interpret this intransigence, the petitioners contend, is to believe that Dole withheld information until it was too late in the proceeding to be useful. The petitioners reiterate that Dole's failure to cooperate means that it failed to act to the best of its ability to provide the information requested. Therefore, the petitioners urge the Department to apply adverse facts available.

To reinforce their position, the petitioners cite the decision memorandum accompanying *Certain Forged Stainless Steel Flanges from India* (*Flanges from India*),[11] a case they claim is remarkably similar to the Dole situation in the instant review. Specifically, argue the petitioners, due to verification findings that the proper comparison market had not been reported, the Department applied adverse facts available for the failure of the respondent to act to the best of its ability. According to the petitioners, the standard from *Flanges from India* – that sales documents are the indicator of destination – should be applied here. The petitioners also point out that in the *POR7 Preliminary Results* adverse facts available were applied to TPC, which the petitioners claim was "similarly failing to report the correct comparison market."[12] According to the petitioners, the Department is mandated to conclude that Dole Thailand's questionnaire response was proved false at verification.

Dole presented only flimsy documentary evidence[13] that the sales in question were actually exported, assert the petitioners, and the Department cannot maintain a standard which allows respondents' unsupported statements to constitute sufficient support for establishing the market of sale of goods. More important, contend the petitioners, is that Dole's own record evidence from verification

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[9] *See* Petitioners' Case Brief for Dole Thailand Ltd. (July 28, 2003) (Petitioners' Dole Brief) at 15.

[10] *See* Antidumping Duty Questionnaire for the Seventh Administrative Review (Sept. 19, 2002) at A-2 (Antidumping Duty Questionnaire), Deficiency Letter to Dole (December 4, 2002) at 1, and Deficiency Letter to Dole (Dec. 26, 2002) at 1, as cited in Petitioner's Dole Brief at 16.

[11] *See Certain Stainless Steel Flanges From India; Final Results of Antidumping Duty Administrative Review*, 66 FR 48244 (Sept. 19, 2001) and the accompanying Issues and Decision Memorandum as cited in Petitioner's Dole Brief at 17.

[12] *See* Petitioners' Dole Brief at 18.

[13] *See id* at 19.

contradicts its assertions about the Thai market. The petitioners maintain that Dole clumsily attempted to manipulate the selection of the appropriate comparison market and the Department must not reward this failure to cooperate.

As an adverse facts available margin, the petitioners propose the use of whichever is higher, the highest margin alleged in the original petition or the highest margin given to a respondent in any segment of this review. The petitioners further argue that, assuming *arguendo*, the Department should use, at a minimum, facts available for NV since the proper comparison market was clearly not reported. In this situation, the Department could decide that all home market sales were made below cost and use constructed value as NV, assert the petitioners. In creating a constructed value, the petitioners argue that the Department should use the highest profit rate calculated for any other respondent in this review.

In response, Dole argues that it fully cooperated with the Department and that there is no basis for an adverse facts available finding. It asserts that the argument put forth by the petitioners, that Dole Thailand deliberately refused to cooperate with the Department, is unsupported by record evidence. Dole first states that the record clearly shows that the Department never asked Dole to submit its home market sales. As support for this claim, Dole cites to the Department's December 26, 2002, supplemental questionnaire and to comments from the petitioners urging the Department to request a full Section B response for the Thai market.[14] Since it was never asked to provide a Section B response for Thai sales, Dole argues that there is no basis to find that it did not cooperate to the best of its ability. Nor did it, according to Dole, try to intentionally mislead the Department as the petitioners claim. In fact, Dole maintains, it cooperated with the Department in responding to the December 26, 2002, supplemental questionnaire and in the scheduling of cost and sales verifications despite national holidays and a verification rescheduling.

Finally, Dole argues that the petitioners' position is not supported by *Flanges from India* as they claim. In that case, the Department discovered at verification that certain home market sales were marked as export sales whereas, Dole contends, at its verification the Department confirmed the accuracy of Dole's reporting of its export and home market sales. It argues that the petitioners' reliance on *Certain Preserved Mushrooms From Chile: Final Results of Antidumping Administrative Review*, 67 FR 31769 (May 10, 2002) is also misleading and inapposite. The respondent in the Chilean mushrooms case, unlike Dole, did not respond to the Department's questionnaire or subsequent request for information.

Department's Position:

We find that in this review Dole reported its comparison market appropriately. *See* Comment 1 above. Therefore, there are no grounds for the application of facts available under sections 776(c) and 782(c)(1) of the Act or section 351.308(a) and (c) of the Department's regulations. For the final results, we calculated NV based on Dole's reported third-country sales to Canada.

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[14] *See* Dole's Case Brief on Preliminary Results of Review (July 29, 2003) at 21 (Dole's Case Brief).

Comment 4: Affiliation

The petitioners argue that Dole and another company are affiliated. Dole disagrees with the petitioners. Due to the proprietary nature of the information related to this issue, this comment is addressed in greater detail in the Dole Analysis Memorandum.

Department's Position:

The evidence on the record of this case does not support the petitioners' claims that the company in question and Dole are affiliated. For a full discussion of the Department's position, which contains proprietary information, see the Dole Analysis Memorandum.

Comment 5: General and Administrative (G&A) Expense Ratio

In a footnote, the petitioners argue that Dole Thailand's G&A ratio is incorrectly based only on Dole Packaged Foods (DPF), rather than the CPF-producing entity Dole Thailand. They contend that the DPF expenses on behalf of Dole Thailand should be included with Dole Thailand's G&A. The petitioners suggest an alternative G&A percentage to use for Dole Thailand[15] to be applied to the packing-inclusive cost of manufacture (COM).

Dole argues that no adjustment to its reported G&A cost is necessary, citing for support its Section D response and Dole's Cost Verification Report.[16] Dole states that these documents confirm that all of the G&A expenses incurred by Dole Thailand are already included in its production costs in the item cost sheets and, therefore, in the reported cost of production.

Department's Position:

The Department believes that Dole has properly reported its G&A ratio. As stated in Dole's Sales Verification Report,[17] G&A is based on Dole Food Co. Inc. (DFC)'s consolidated G&A expenses,

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[15] *See* Petitioners' Dole Brief at page 22, footnote 14.

[16] *See* Dole's Rebuttal Brief at page 24, citing to its Section D Questionnaire Response (November 18, 2002) at 20, 22-23, and 36 (Dole's Section D Response), Section D Cost Reconciliation (December 4, 2003) at R-3, R-4, and R-8, and Verification of the Cost Information in the Response of Dole Food Company, Inc., Dole Packaged Foods Company and Dole Thailand Ltd. in the 2001-2002 Administrative Review of the Antidumping Duty Order on Canned Pineapple Fruit from Thailand (April 30, 2003) at 7-8 and Exhibits 15-B and 15-C (Dole's Cost Verification Report).

[17] *See* Verification of the Sales Information in the Response of Dole Food Company, Inc., Dole Packaged Foods Company and Dole Thailand Ltd. in the 2001-2002 Administrative Review of the Antidumping Duty Order on Canned Pineapple Fruit from Thailand (May 29, 2003) at 17 and Exhibit-14 (Dole's Sales Verification Report).

not on DPF's expenses. DFC's expenses include all Dole legal entities including DPF and Dole Thailand. Therefore, the Department made no change to Dole's G&A ratio for the final results of this review.

Comment 6: Tinplate

The petitioners argue in a footnote that tinplate is a major input for CPF which does not meet the requirements of the major input rule. They contend that tinplate costs should be increased by the difference between the affiliated and non-affiliated tinplate purchases as found in Dole's Cost Verification Report.[18]

Dole states that it demonstrated that the "affiliated-supplied" tinplate was purchased, at cost, through, but not produced by, an affiliate, Castle and Cooke Worldwide (CCWW). It feels that the Department's verification confirmed this.[19] Any differences in the price of the tinplate reflect the different prices between two unaffiliated producers of tinplate. Therefore, Dole claims that no cost adjustment is necessary.[20]

Department's Position:

In this instance, tinplate does not constitute a major input from an affiliated party. Under section 773(f)(3) of the Act, an affiliated party must produce the major input for the section to apply. In this case, since neither Dole nor CCWW produces tinplate, it cannot be addressed under the major input rule. Therefore, we must examine this issue under section 773(f)(2) of the Act, which states that transactions between affiliated parties may be disregarded if the transfer price does not fairly reflect the amount usually reflected in the market under consideration. Normally, the Department compares the transfer price paid by the respondent to affiliated parties to those paid to unaffiliated suppliers.[21] In this case, we find that Dole did purchase tinplate from CCWW at a lower price than the price paid to an unaffiliated supplier, as shown in Dole's chart in Exhibit D-2 of Dole's Section D Response and found at verification.[22]

Dole argues that CCWW is an "affiliated-supplier" who passes the tinplate on to Dole at the price it pays its supplier, plus freight. Therefore, any price differences between the tinplate purchased from

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[18] *See* Petitioners' Dole Brief at 22 footnote 14.

[19] *See* Dole's Rebuttal Brief at pages 24 and 25 citing to Dole's Cost Verification Report at 14.

[20] *See* Dole's Rebuttal Brief at 25.

[21] *See e.g., Certain Polyester Staple Fiber from Korea: Final Results of Antidumping Duty Administrative Review* 68 FR 59366 (October 15, 2003)

[22] *See* Dole's Cost Verification Report at 14.

CCWW or that purchased from an unaffiliated supplier reflect the differences between two unaffiliated suppliers, and no price adjustment is needed. The Department has previously rejected this argument. *See, e.g., Notice of Final Determination of Sales at Less Than Fair Value: Certain Cut-To-Length Carbon-Quality Steel Plate Products from Korea*, 64 FR 73196 (December 29, 1999) at Comment 12. The Department looks at purchases by the respondent, not at purchases by the respondent's affiliated party from an unaffiliated source. Since Dole purchased tinplate from CCWW, the purchase is an affiliated purchase, not an indirectly unaffiliated purchase, as Dole claims.

The Department adjusted tinplate portion of direct material costs (DIRMAT) by the difference between the average prices of affiliated versus unaffiliated prices for the POR, per Exhibit D-2 of Dole's Section D Response. The Department finds this to be a more accurate adjustment than taking the difference between the affiliated and unaffiliated tinplate purchases in Dole's Cost Verification Report because the report reflects one purchase from each source for a specific product size. The POR average, however, reflects the broader experience of the POR and all tinplate dimensions. For further details of the adjustment, which due to the proprietary nature of the information related to this issue cannot be discussed here, see the Dole Analysis Memorandum**.**

Comment 7: Credit Expenses

Dole maintains that, for Canadian sales, the Department should have used the short-term borrowing rate submitted by Dole in its Section B[23] response. It contends that this rate, the average of the Bank of Canada's prime business rates for the POR, meets the requirements laid out for situations where companies have no short-term borrowing in the currency in which the sales were made. According to Dole, its reported rate is a readily available one which reflects the actual cost of short-term borrowing in the Canadian-dollar market. Dole also maintains that this rate is a standard rate available to corporations.

Despite this, Dole states that the Department recalculated Canadian credit expenses and provided a terse and unsupported explanation for doing so. Dole argues that the Department incorrectly assumed that Dole Canada could receive the Canadian commercial paper rate even though evidence shows that it could not borrow at such a favorable rate. Dole questions what the Department meant when it said that the Canadian prime rate does not reflect Dole Canada's usual commercial behavior.[24] It further argues that the Department's citation to the Fifth Administrative Review's Final Remand Results[25] does not support the use of a substitute interest rate. According to Dole, in the instant review the

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[23] *See* Dole's Section B Response (October 23, 2003) at Exhibit B-10.

[24] *See* Dole's Case Brief at 5.

[25] *See Final Results of Redetermination Pursuant to the U.S. Court of International Trade Remand Order, Maui Pineapple Company, Ltd. v. United States,* Court No. 01-03-01017 (filed June 16, 2003) (*Final Remand Results*).

Department did not consider, as it did for the remand, that Dole's actual average short-term interest paid was less than the U.S. prime rate.[26]
Citing the Final Remand Results,[27] Dole maintains that the Department acknowledged, for U.S.-dollar transactions, that it is standard to use the broader commercial and industrial rate for loans maturing in 30 to 365 days and not the commercial paper interest rates. Dole inferred from the remand that the Department did not use equivalent rates for Canadian dollar transactions because none was available; therefore, the Bank of Canada's 30-day commercial paper rate was used. The commercial paper rate, quotes Dole, "'is a loan of a financially strong company' with interest rates below prime."[28]

Dole further argues that there is no basis to assume that either Dole Canada or DFC would be able to issue commercial paper in Canada at rates available to "major finance company participants in Canada."[29] Dole also contends that the ability of a parent company to borrow at a given rate does not translate into the ability of a subsidiary to borrow in a different market and currency. The only case where a parent company's actual costs of short-term borrowing are appropriate for imputing a subsidiary's credit is when, claims Dole, the parent's borrowing is used as a surrogate rate for a subsidiary's imputed credit. According to Dole, DFC's actual credit rating, which is barely investment grade[30] and does not allow it to borrow at the favorable rates available for commercial paper users, was not taken into consideration. Dole contends that comparing actual average short-term interest rates during the POR[31] to the average U.S. 30-day commercial paper rate[32] confirms its statements about credit ratings. Further, argues Dole, its actual rate shows it could not have borrowed at the commercial paper rate, implying that it would have used that rate if were able to do so.

Dole argues that in the remand proceeding the Department attempted to justify the use of the commercial paper rate on two grounds. First, the S&P ratings were for long-term debt and Dole claims the Department erroneously inferred from this that Dole did not provide a short-term rating by choice. Dole asserts that the Department gave little weight to the credit ratings on the record and points out that because Dole has not issued any commercial papers, credit rating agencies have not established short-term ratings for it. Second, Dole addresses the Department's assertion that using the commercial

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[26] *See id.* at 8, as cited in Dole's Case Brief at 6-7.

[27] *See id.*

[28] *See id*.

[29] *See Final Remand Results* at 7, as cited in Dole's Case Brief at 7.

[30] *See* Dole's credit ratings from Standard & Poor's (S&P) and Moody's in Dole's Case Brief at 7-8 and Attachments 1 and 2.

[31] *See id* at 8.

[32] *See id* at 8 and Attachment 3.

paper rate was the conservative approach[33] based on finding that the percentage spread between the Canadian prime rate and the Canadian commercial rate was greater than the percentage spread between the U.S. prime rate and its actual short-term cost of borrowing.[34] Dole states that the opposite situation has occurred in the instant review.[35] Consequently, Dole argues that to be conservative the Department should use the higher rate, for which Dole believes the evidence shows it would qualify. It asserts that the credit rating decisively shows that Dole would not receive the lower rate and that the Canadian commercial paper rate is not an appropriate surrogate.

Dole argues that the Department should revert to using the Canadian prime rate, as it originally submitted. It also proposes that, as an alternative, the Department could average the Bank of Canada's prime rate and commercial paper rate, which would yield a rate of 3.57 percent. According to Dole, this would be more in line with the U.S. Federal Reserve's wider lending experience, which is used by the Department for U.S.-dollar transactions, and would better reflect a rate at which Dole would be able to borrow.

Since Dole submitted a Canadian-dollar prime rate that could be used, the petitioners contend that Dole is saying that this originally submitted rate must be used. This logic is flawed, argue the petitioners, and any submitted rate must be subjected to examination. They state that the Department was correct in determining that the average commercial paper rate, which represents short-term debt usually incurred by large companies, was an appropriate interest rate to utilize. According to the petitioners, nothing on the record indicates that Dole would not be eligible for this rate. They further argue that Dole Food Companies' 2001 annual report shows that it had at least average creditworthiness in both the short and long term.

In response to Dole's claims that it would not have qualified for the commercial paper rate, the petitioners argue that even companies with "low investment grade" bond ratings can be considered a good credit risk because of a low risk of default. They further state that Dole is exactly the type of company that is able to issue commercial paper. Additionally, claim the petitioners, credit rating services such as S&P and Moody's refer to long-term debt, such as bonds or notes, to which commercial paper is not comparable. These rating services can also have separate commercial paper ratings, maintain the petitioners.

The lack of "spreads" between the U.S. and Canadian rates used for calculation in the *POR7*

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[33] *See Final Remand Results* at 14, as cited in Dole's Case Brief at 8.

[34] *See id* at 9.

[35] Due the proprietary nature of Dole's actual borrowing rate, the percentage between Dole's U.S. actual short-term borrowing and the U.S. average prime cannot be shown here. *See* Dole's Case Brief at 9 for this percentage and the difference between the Canadian commercial paper and prime rates.

Preliminary Results,[36] to which Dole objects, is splitting hairs, argue the petitioners. They point out that the Department does not need to find an exact correlation between the rates and benchmarks, nor limit them to ones that are in the respondent's favor. Rather, a rate should be found that supports the experience of comparing Dole's U.S. borrowing to the U.S. prime rate.

Department's Position:

The criteria for determining interest rates in markets where a respondent has no short-term borrowing are laid out in Policy Bulletin 98.2:

> In the case of foreign market sales, it is not possible to develop a single consistent policy for selecting a surrogate interest rate when a respondent has no short-term borrowings in the currency of the transaction. The nature of the available information will vary from market to market. However, any short-term interest rate used should meet the three criteria discussed above – it should be reasonable, readily obtainable, and representative of "usual commercial behavior."

Both the Canadian prime rate and prime commercial paper rate meet the first two criteria. At issue here is the third criterion. For the reasons discussed below, the Department finds that the Canadian commercial paper rate is representative of Dole Canada's usual commercial behavior.

The facts in this review are nearly identical to those in the *Final Remand Results*, in which we also used the commercial paper rate.[37] There have been no significant changes between the reviews to convince the Department that the Canadian prime rate is more appropriate. First, from Dole's U.S. sales response,[38] we know that in the U.S. market Dole's usual commercial behavior would be to obtain short-term credit at less than the published prime rate. Dole contends that the ability of a parent company to borrow at a given rate does not translate into the ability of a subsidiary to borrow in a different market and currency. However, we established in the Final Remand Results that while it is not necessarily true that a company's potential credit rating in one market can be inferred by that company's experience in a different market, with Dole Canada such an inference can reasonably be made. We know from Dole's responses and our verification that Dole Canada is an integral part of

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[36] *See POR7 Preliminary Results*.

[37] *See Final Remand Results*.

[38] *See* Dole's Section C Questionnaire Response (November 18, 2003) at C-40 and Exhibit C-11.

DPF[39] and that, while Dole Canada is a separate legal entity it is integrated into DPF's management.[40] Therefore, since Dole's U.S. short-term borrowing is below the U.S. prime rate, given the situation here, it is only reasonable to assume that Dole Canada would be able to borrow below the Canadian prime rate. As this is the rate Dole submitted, the Department had to find a rate more reflective of Dole Canada's usual commercial behavior.

Dole's statement that there is no Canadian rate equivalent to the U.S. commercial and industrial rate is correct. There are a limited number of rates that meet our needs in the Canadian market. We believe that the 30-day commercial paper rate is the best rate available to us. First, commercial paper has maturities that range up to 270 days, but average about 30 days, according to the U.S. Federal Reserve. It defines commercial paper as "short-term, unsecured promissory notes issued primarily by corporations."[41] We believe that this best reflects a normal payment schedule[42] and the usual commercial behavior of Dole Canada. As a result, for the *POR7 Preliminary Results*, we averaged the Canadian commercial paper rates for the POR and used the resulting rate to calculate imputed credit expenses for Canada.

Dole's argument that its poor credit ratings from Moody's and S&P show that it is not eligible for the "favorable" commercial paper rate is not convincing. We agree with the petitioners that these are long-term ratings and have, at best, tenuous relevance to short-term interest rates. We do not dispute Dole's statement that it does not have short-term credit ratings. However, we cannot merely accept long-term ratings as a substitute for lack of short-term ratings. The facts of this case are that Dole has no credit ratings from third parties that the Department can use in its analysis. Further, Dole's actual short-term borrowing history in the United States is a better reflection of Dole's usual commercial behavior than long-term credit ratings. Although Dole's actual borrowing for the POR differs from the U.S. commercial paper rate , in lieu of actual Canadian borrowings, our goal is to find the best surrogate available, which does not necessarily translate into an identical match. While the Department would prefer to have a Canadian rate that reflects the difference between Dole's actual U.S. borrowings and the U.S. prime rate, this information simply does not exist in this case. The commercial paper rate, however, serves as the best available surrogate. Moreover, Dole's actual U.S. borrowing is below[43] the U.S. prime rate. Therefore, it is more appropriate to use a short-term interest rate in Canada that is below the Canadian prime rate.

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[39] *See* Dole's Section A Questionnaire Response (October 23, 2003) and Dole's Sales Verification Report.

[40] *See* Dole's Sales Verification Report at 3.

[41] *See* U.S. Federal Reserve Release "Commercial Paper" at http://federalreserve.gov/releases/, as cited in *Final Remand Results* at 8.

[42] *See* Dole's Section B Questionnaire Response (November 18, 2002) at B-14 for a description of Dole's payment terms.

[43] Due to the proprietary nature of this information, how it is different cannot be discussed here. *See* Dole's Case Brief at 9.

In response to Dole's suggestion that we average the POR Canadian prime rate average with the POR Canadian commercial paper rate average, we again cite Policy Bulletin 98.2 which states that "we will use publicly available information to establish a short-term interest rate applicable to the currency of the transaction." As we stated in the *Final Remand Results*[44] We continue to believe that using an average of the Canadian prime rate and the Canadian commercial paper rate would unnecessarily distort the calculation of imputed credit.

Comment 8: Quantity Weighting Factors

Dole argues that in the Department's margin calculation programs, the Department erroneously used the incorrect quantity. The Department used quantity in standard cases (QTYSCT/U) in its calculation. Dole reiterates that it does not track the country of origin of the CPF (*i.e.*, Thailand or the Philippines). Therefore, consistent with prior reviews, it used a weighted factor to reflect the proportion of subject merchandise sourced from Thailand, which is reflected in the fields QTYWTDT/U. Dole argues that the Department should change the comparison market and margin programs to reflect the quantities given in QTYWTDT/U.

The petitioners made no rebuttal argument to this comment.

Department's Position:

The Department agrees with Dole that QTYWTDT/U are the appropriate quantity fields to use in its margin calculation. The programs have been changed accordingly.

Comment 9: Calculation of the CEP and Commission Offsets

Dole argues that the Department failed to properly calculate the CEP and commission offsets in its margin calculation program. Specifically, Dole claims that the program contains two clerical errors. The first is that, in the CEP/commission offset calculation, the third country's indirect selling expenses improperly include indirect selling expenses incurred outside of Canada or DINDIRST. Dole suggests programming language to separate the indirect selling expenses fields into INDIRST and DINDIRST.[45] The second error alleged by Dole is that the program fails to make an adjustment for commission differences in the instances where the "commission of the weighted averaged third country comparison sales is less than the commissions of the U.S. transaction."[46] Again, Dole suggests language it feels will

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[44] *See Final Remand Results* at 16.

[45] *See* Dole's Case Brief at 11.

[46] *See id.*

correct this problem.[47]

According to the petitioners, however, the Department's programming language correctly addresses and handles all commission situations. In response to Dole's first claim, the petitioners argue that foreign-incurred indirect selling expenses on U.S. sales where U.S. commissions are exceeded by comparison market commissions is correct. The petitioners state that the program starts by defining the "OFFSET" variable as comparison market indirect selling expenses capped by U.S. incurred indirect selling expenses. Then, they contend, to apply the offset to the U.S. side it is decreased by the lesser of commission difference or foreign-incurred indirect selling expenses, or MUSOTHIS.[48] Where a commission offset is necessary on the U.S. side, it is, the petitioners argue, correct to use foreign-incurred U.S. selling expenses.

In response to Dole's second claim, the petitioners assert that the Department's programs leave no scenario unaddressed and properly address situations where the U.S. commissions exceed weight-averaged comparison market commissions.[49] The program, they argue, correctly caps the total offset for commission and level-of-trade differences between comparison market and CEP sales.[50]

Department's Position:

In response to the first issue raised by Dole, the Department finds that all foreign-incurred indirect selling expenses are correctly included in the CEP/commission offset calculation. Section 351.412(f)(iii)(2) of the Department's regulations address the applicable expenses for inclusion in a CEP offset. It states that " "indirect selling expenses" mean selling expenses other than direct selling expenses or assumed selling expenses. . . ." The Department interprets this to mean that regardless of where the indirect selling expenses are incurred (*i.e.*, either in or outside the third country market or the United States) the offset must include all indirect selling expenses, "regardless of whether a particular sale were made, . . . that reasonably may be attributed, in whole or part, to such a sale."[51] Further, the variable MUSOTHIS, used in the CEP/commission offset, includes all indirect selling expenses incurred for U.S. sales including DINDIRSU (*i.e.*, the U.S. equivalent of DINDIRST). Expenses included in both the U.S. and comparison markets and used in this calculation should be equivalent; therefore, we did not remove DINDIRST from the CEP/commission offset calculation.

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[47] *See id.*

[48] *See* Petitioners' Rebuttal Brief for Dole Thailand, Ltd. (August 4, 2003) at 4 for program language. (Petitioners' Dole Rebuttal Brief)

[49] *See id.*

[50] *See id.* at 5 for details.

[51] *See* Section 351.412(f)(iii)(2) of the Department's regulations .

Dole's assertion that our program does not make an adjustment for differences in commissions in those cases where the commission on the weighted-average comparison-market sales is less than the commission on the U.S. transaction is incorrect. The programming language for such situations is contained in lines 2503 through 2514 of our preliminary results margin calculation program. First, we calculate a commission offset (represented by the variable COMIND) based on the indirect selling expenses incurred on those comparison-market sales for which no commissions were incurred. This commission offset is capped at the difference between the U.S. commission and the weighted-average commissions of the comparison-market sales. Second, we calculate comparison-market indirect selling expenses available for the CEP offset by subtracting the indirect selling expenses we used in the commission offset from the total comparison-market indirect selling expenses. We do this in order to avoid double-counting comparison-market indirect selling expenses. We then calculate the CEP offset by using the remaining (*i.e.*, net of the commission offset) comparison-market indirect selling expenses capped by the amount of indirect selling expenses incurred on the U.S. sale. The total offset is based on the sum of the commission offset and the CEP offset. Thus, we do make a commission offset in situations where the commission on the weighted-average comparison-market sales is less than the commission on the U.S. transaction.

VIII. ISSUES SPECIFIC TO KUIBURI

Comment 10: Volume of Pineapple Input for Product Specific Fruit Costs

The petitioners argue that the total fruit weight used by the Department in the *POR7 Preliminary Results* to re-calculate Kuiburi's product-specific fruit costs is overstated and therefore Kuiburi's fruit costs are understated.[52] To correct this, they contend that the Department should subtract from the total fruit weight an amount for fruit that is not subject to the NRV calculation.

Kuiburi made no rebuttal argument to this comment.

Department's Position:

The Department finds that some adjustment to the total fruit weight used in the *POR7 Preliminary Results* for Kuiburi's product-specific fruit costs calculation is warranted. However, the petitioners' suggestion would exclude some fruit weight that is subject to the NRV calculation. Due to the proprietary nature of the information related to this issue, this comment is addressed in greater detail in the Analysis Memorandum for Kuiburi, dated concurrently with this notice, on file in the CRU.

Comment 11: Costs outside the POR

[52] Due to the proprietary nature of this information it cannot be summarized here. *See* Petitioners' Case Brief for Kuiburi Fruit Canning Co., Ltd. (July 28, 2003) (Petitioners' Kuiburi Brief) at pages 2-3 for further information.

The petitioners contend that Kuiburi calculated pineapple core costs incorrectly for a certain product line[53] because part of the costs on which the core costs are based is from outside the POR. Therefore, they argue, this product line has over-allocated pineapple core costs, while pineapple fruit costs to all other products, including CPF, are under-allocated. According to the petitioners, a purchase made in July 2002 should be disallowed and the costs which this purchase affects should be recalculated.

Kuiburi states that this purchase was mistakenly labeled July 2002. It maintains that the pineapple core in question was purchased in June 2002. As support, Kuiburi cites a table in Exhibit D-4(a),[54] where it states it correctly reported this information.

Department's Position:

The Department has made no change to Kuiburi's pineapple core costs. The charts in question have identical amounts for every other month of the POR. Further, the amount entered for July 2002 in Exhibit D-4(b)[55] is identical to the amount for June 2002 in the Exhibit D-4(a) chart. This, coupled with the fact that no other charts in this exhibit have lines for July 2002 and that there is nothing listed for June 2002 in the chart in Exhibit D-4(b), seems to confirm Kuiburi's statement. Therefore, we accept Kuiburi's statement that it mistakenly labeled the chart in question from Exhibit D-4(b) as purchases for July and not June.

Comment 12: G&A and Interest Expenses

The petitioners argue that the denominator Kuiburi used to calculate its G&A and interest expenses incorrectly includes packing expenses. They contend that packing expenses should be excluded from the denominator because the ratios for G&A and interest expenses, respectively, are multiplied by the COM, which does not included packing expenses. Citing case precedent and the Antidumping Duty Manual, the petitioners state that the consistency between the COM and the G&A and interest expenses denominators (*i.e.*, either they both include packing expenses or both exclude packing expenses) is in keeping with the Department's normal practice.

The petitioners acknowledge that it is not possible to determine the packing expenses included in Kuiburi's cost of sale (COS) for the period ending December 31, 2001. They propose that the POR total packing expenses should be used as a surrogate amount. This amount should be subtracted from Kuiburi's 2001 COS to create a new denominator which should then be used to recalculate both G&A and interest expenses, respectively.

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[53] Due to the proprietary nature of this information, the type of products cannot be discussed here. *See* Petitioners' Kuiburi Brief at pages 2-3 for further information.

[54] *See* Kuiburi's Section D Questionnaire Response (Oct. 29, 2002).

[55] *See id*.

Kuiburi made no rebuttal argument to this comment.

Department's Position:

We have found, as the petitioners alleged, that packing expenses appear to be included in COS and, therefore, in the denominator for G&A and interest expenses. Because COM excludes packing expenses, it is our practice that the denominator in the G&A and interest expenses calculations should exclude packing expenses as well. Since Kuiburi's COM excludes packing expenses,[56] the Department will exclude packing expenses from COS.

Since G&A and interest expenses are based on the fiscal year – here corresponding to the 2001 calendar year and not the POR, the Department would deduct packing expenses for all products in all markets for that year. However, we were unable to locate this information in Kuiburi's response. Therefore, pursuant to section 776(a)(1) of the Act, the Department applied facts available for the amount of the packing expense. Our facts available packing expenses are the total amounts reported for the POR in Exhibit B-9 of Kuiburi's Section B Questionnaire Response (October 28, 2002). Therefore, for the final results, we recalculated both G&A and interest expenses using the new denominator of COS less the facts available packing expense.

Comment 13: Net Realizable Value

In the preliminary results, the Department calculated a facts available NRV for Kuiburi based on the average of four other respondents' data. The petitioners argue that the Department should weight-average the four other respondents' data to determine the facts available NRV for Kuiburi. This is, according to the petitioners, the Department's normal preference. They also state that the Department should carry the value to two decimal places, rather than round to the nearest whole percentage, as it did. Although this decimal place adjustment would be a small change, the petitioners argue that, in keeping with the Department's normal practice, the NRV would then be more accurate. In a footnote, the petitioners also state that they feel that, while Kuiburi's NRV is flawed, the Department should use it, rather than "reward the company through the use of a 'facts available' at a significantly lower rate."[57]

Kuiburi made no rebuttal argument to this comment.

Department's Position:

The Department's current NRV methodology in this case is to use NRVs are based on the five year historic period (*i.e.*,1990-1994) and to take into account both separable cost and revenue. In the instant review, the Department discovered that there were problems with the methodological approach

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[56] *See* Kuiburi's datasets used in the *POR7 Preliminary Results*.

[57] *See* Petitioners' Kuiburi Brief at 6.

used by Kuiburi to calculate NRV it applied to its fruit costs. Specifically, Kuiburi's NRV is based on revenue and on a floating five-year period. We recognize that it is not possible for Kuiburi to get us the historical data requested because Kuiburi did not have canned pineapple operations until February 21, 1992,[58] and therefore did not have NRV data available for most of the historic period. Further, from 1992 until 1996, Kuiburi has stated that it did not distinguish between solid pineapple products and juice pineapple products in it books and records and has no separable cost data for either product from that time period.[59] Under section 351.308(a) of the Department regulations, we may "make determinations on the basis of facts available whenever necessary information is not available on the record." *See also* Section 777(a) of the Act.

For the final results of this review the Department will continue to use the facts available rate applied in the preliminary results of this review. We believe this is the best rate available because it is based on the averages of four companies who calculated their NRV based on the Department's methodology. That is, these NRVs are based on the five-year historic period (*i.e.*,1990-1994) and take into account both separable cost and revenue. The petitioners have made no arguments that convince us that this rate is not appropriate. Further, when a company cannot provide an acceptable fruit allocation methodology the Department has, in a past segment of this case, used an average of the other respondents' data as facts available.[60]

NRV does not change based on the volume of pineapple each company produces each year. It is based on revenue and separable costs, not quantity. However, we do agree with the petitioners that carrying the NRV to the second decimal place is more accurate. Therefore for the final results we will round our facts available NRV to the second decimal place.

IX. ISSUES SPECIFIC TO MALEE

Comment 14: NRV

The Department asked Malee to resubmit its case brief[61] for the final results of POR7 because it found that the document contained new factual information. Malee claims that rejecting the information it submitted in its original case brief[62] goes against the Department's regulations and established practices

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[58] *See* Kuiburi's Supplemental Questionnaire Response (February 13, 2003) at X-10 (Kuiburi's Supplemental Response).

[59] *See* Letter to the Secretary from Somkiat Chavalitvorakul (April 29, 3003).

[60] *See Final Determination of Sales at Less Than Fair Value: Canned Pineapple Fruit from Thailand*, 60 FR 29553 (June 5, 1995) at Comment 6 (*LTFV Final Determination*).

[61] *See* Resubmission of Malee's Case Brief (August 7, 2003) (Malee's Case Brief).

[62] *See* Letter from Malee to the Secretary of Commerce Re: Canned Pineapple Fruit from Thailand: Determination of "New Factual Information" in Malee's Case Brief (August 7, 2003).

because the information rejected by the Department comes from documents on the record in previous segments of this proceeding that contain Malee's business proprietary information, and from documents submitted by Kuiburi and the petitioners that contain only public information.

Malee claims that all the withdrawn documents are already on the record of this proceeding, as the Department defines "'proceeding' as encompassing the time between the date on which the petition was filed to the present day."[63] Malee also cites section 351.104(a) of the Department's regulations as evidence the Department should consider the information Malee submitted as not new to the record. Malee claims this regulation states that the record of this proceeding encompasses all departmental memoranda and submissions by interested parties for Department case number A-549-813.

Further, Malee argues that the Department, the petitioners, and other parties all reference facts from other segments of the proceeding and that such information is vital to the Department's decisions. Malee maintains that the withdrawn information is not new factual information, rather, it provides a circumstantial context for decisions the Department reached in previous segments of this proceeding, so that a comparison may be made between the Department's treatment of Malee and other companies in previous segments of this proceeding – the real issue at hand.

The arguments summarized below come from Malee's resubmitted brief. Our reasons for requesting a new brief are discussed in the Department's Position for this issue.

Malee argues that the Department has incorrectly recalculated its reported fruit cost allocation. Malee points out that the Department rejected both sets of fruit costs that Malee submitted for POR7. Malee's submitted "FRUITA" costs represent the solid-to-juice allocation used by Malee in its normal course of business, while its "FRUITB" costs are based on the Department's historical NRV methodology. Instead of using these costs, the Department recalculated Malee's fruit costs in its preliminary results using the same solid-to-juice ratio (historic normal cost allocation) that it has applied to Malee since the original Less Than Fair Value (LTFV) investigation.[64] Malee itself used this ratio in its normal books and records until 1999 (first half of the fifth administrative review (POR5)). Malee points out that this recalculation caused more of its home-market comparison sales to fail the cost test, raising its margin. *See* Malee's Case Brief at 3-5.

Malee concedes that the new fruit cost allocation methodology used in its normal books and records (new normal allocation) is not linked to actual sales data, but claims that this ratio should still be used. However, if the Department does not use this ratio, Malee maintains that the Department should treat Malee consistently with other respondents in this review and either use the historical NRV data Malee submitted (historic NRV allocation) or use the neutral facts available the Department used for Kuiburi in

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[63] *See* 19 CFR section 351.102(a).

[64] The actual ratios used to allocate the fruit costs are proprietary information and cannot be listed here. *See* Malee Analysis Memorandum, dated concurrently with this notice, for the actual ratios.

the *POR7 Preliminary Results. See* Malee's Case Brief at 5.

Malee argues that the Department has a strong preference for using a historical NRV-based fruit cost allocation if the allocation the company uses in its normal books and records is not acceptable. Malee refers to the Department's formulation of this policy in the LTFV investigation and subsequent administrative reviews. In the LTFV investigation, according to Malee, the Department rejected alternative weight-based allocations in favor of a respondent's normal allocation. Indeed, the Department used Malee's normal books and records allocation in the LTFV investigation. However, Malee claims that this allocation was flawed because Malee allocated a distortively high amount of costs to solid pineapple products in its normal books and records at the time of the LTFV investigation. The company also notes that the Department, in its final determination, expressed its preference for a historical NRV-based cost allocation, but was unable to use the methodology in the LTFV investigation due to lack of data.[65] *See* Malee's Case Brief at 5-9.

In the first administrative review (POR1), in which Malee did not participate, the Department discovered that the respondents had changed their normal books and records allocations to reflect weight-based allocations. Malee points out that the Department did not appear to examine the option of going back to the original normal books and records allocations. Rather, the Department devised its historical NRV allocation methodology and used that to allocate fruit costs.[66] *See* Malee's Case Brief at 9-10.

Malee contends that the Department has continued to substitute its NRV methodology when a company's own normal books and records allocations are not deemed reasonable. Malee presented a chart summarizing the allocation methodology used for each respondent since the investigation. It points out that, for TIPCO in particular, the Department reverted to historical NRV methodology when TIPCO changed its normal books and records in POR1, rather than reverting to the normal allocation that the Department used in the LTFV investigation. Malee also points out that, for Kuiburi, the Department used Kuiburi's normal allocation until POR5 and POR6, when it used the historical NRV methodology, and POR7, when the Department used neutral facts available in its preliminary results. Malee states that it appears that Kuiburi used the same normal allocation in POR7 that it had in past reviews but the Department chose to reject both this and the NRV allocation in favor of averaging the historical NRV allocations of the other respondents as a form of neutral facts available.[67] Malee also points out that for POR5, POR6, and POR7, it is the only respondent for which the Department has not used historical NRV. *See* Malee's Case Brief at 11-13.

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[65] *See LTFV Final Determination* at Comment 6.

[66] *See Canned Pineapple Fruit from Thailand*: *Preliminary Results and Partial Termination of Antidumping Duty Administrative Review*, 62 FR 42487 under General Fruit Cost Allocation (Aug. 7, 1997).

[67] *See* Kuiburi's POR7 Section D Questionnaire Response (Oct. 29, 2002). *See also POR7 Preliminary Results* at 38297.

Malee's next major argument centers on its perceived treatment by the Department. Malee claims that the Department has failed to apply to Malee the same standards it has applied to other respondents in this proceeding. The Department used Malee's normal books and records until POR5, when Malee changed its methodology to one based on ". . . the 'expected'" net realizable value of the finished good."[68] In this review, the Department used Malee's historic normal cost allocation because ". . . Malee did not provide sufficient information to support its claim that the new fruit cost allocation methodology is based on NRV. . . ."[69] Malee claims that this treatment is inconsistent with the way the Department treated respondents in POR2. In that review, the Department rejected the respondents' new weight-based normal allocations in favor of the Department's historic NRV methodology. In contrast, Malee claims that when Malee switched its normal allocation, the Department reverted to Malee's historic normal cost allocation instead of to the Department's historic NRV methodology. Malee claims that the Department did not request that Malee submit this data for POR5 and therefore Malee did not submit it. *See* Malee's Case Brief at 14-16.

In POR6, Malee submitted its new normal allocation costs as well as costs based on the Department's historic NRV methodology. The Department used the NRV costs in the *POR6 Preliminary Results*, but reverted back to Malee's historic normal cost allocation for the final results.[70] The Department decided that:

> Since there is no record evidence to support a conclusion that Malee's cost allocation method previously used by the company and relied upon by the Department unreasonably allocates fruit costs to the different products produced, for the final results, the Department used Malee's historic cost allocation method used in previous reviews.[71]

According to Malee, since the Department apparently did not hold this standard to POR1 respondents, particularly TIPCO, the Department is treating Malee inconsistently. Malee further contends that the Department made the same choice in POR6 as it did in POR1 when several respondents changed to weight-based fruit cost allocations. Again, the Department reverted to the historic NRV methodology for these respondents instead of previously used company cost allocations. Malee contends that it is the only respondent for which the Department has rejected a new allocation based on the company's

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[68] *See Notice of Preliminary Results and Partial Rescission of Antidumping Duty Administrative Review: Canned Pineapple Fruit From Thailand*, 66 FR 18596 (April 10, 2001) at 18600.

[69] *See id.*

[70] *See Notice of Preliminary Results, Partial Rescission of Antidumping Duty Administrative Review, and Preliminary Determination to Revoke Order in Part: Canned Pineapple Fruit From Thailand*, 67 FR 51171 (Aug. 7, 2002) (*POR6 Preliminary Results*). *See also Notice of Final Results of Antidumping Duty Administrative Review, Rescission of Administrative Review in Part, and Final Determination to Revoke Order in Part: Canned Pineapple Fruit From Thailand*, 67 FR 76718 (Dec. 13, 2002) (*POR6 Final Results*).

[71] *See POR6 Final Results* at Comment 6.

books and records and an attempted historic NRV allocation in favor of an historical normal cost allocation. Malee argues that it is being penalized for not changing to a weight-based allocation system in its normal books and records. *See* Malee's Case Brief at 16-19.

In its *POR7 Preliminary Results*, the Department rejected both Malee's new normal allocation methodology and its historic NRV allocation. Regarding the NRV allocation, the Department wrote:

> Under our NRV regime, our policy has been to not accept revenue factors linked to revenue earned after the initiation of the Thai pineapple investigation and also to not accept revenue factors which cannot be linked to actual sales data. Furthermore, the Department does not accept NRV allocations based on less than the full five-years worth of data.[72]

Malee argues that the Department's reasons for rejecting Malee's historic NRV allocation are insufficient because they fail to address the facts that 1) Malee did not produce juice products prior to mid-June 1991, as the Department verified, and 2) the nine months of missing data, which were more than 10 years old, that Malee could have reported, have been destroyed in compliance with Thailand's record retention laws.[73] Malee argues that it should not be punished for not being able to supply information that does not exist and that the Department erred in not explaining these factors in its *POR7 Preliminary Results*. Furthermore, Malee explains that gathering this cost information is burdensome and that it has "cooperated to the fullest extent possible and has provided information above and beyond what can reasonably be expected for the historical period requested, particularly for a company whose historical NRV data had been unnecessary until POR6." *See* Malee's Case Brief at 19-22.

Finally, Malee claims that the Department's statement that it does not accept fewer than five years' worth of data for NRV calculations is untrue. Malee cites the Department's LFTV Final Determination which states that "{i}deally, such a NRV methodology would compare historical cost and sales data . . . over a period encompassing several years prior to the antidumping proceeding. . . ." Malee argues that the words "ideally," "would," and "several" suggest that five years of data would be nice but are not necessary. Malee also points out that in the *Lumber Final Determination*,[74] the Department used fewer than five years of data to calculate NRV. Malee contends that the 27 months of missing data should be accepted due to the reasons it outlined above. Furthermore, it argues that the 33 months of NRV data it did submit are reasonably uniform and should be sufficient to rely upon for Malee's fruit cost allocation. *See* Malee's Case Brief at 23-24.

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[72] *See* Memorandum to the File: Analysis Memorandum for Malee Sampran Factory Public Company, Ltd. (June 20, 2003) at 5 (Malee Preliminary Results Analysis Memorandum).

[73] *See* Malee's POR7 Section D Questionnaire Response (October 29, 2002) at D-55, citing Malee's POR6 Supplemental Questionnaire Response.

[74] *See Notice of Final Determination of Sales at Less Than Fair Value: Certain Softwood Lumber Products from Canada* (April 2, 2002) and the accompanying Issues and Decision Memorandum (March 21, 2002) at Comment 4 (*Lumber Final Determination*).

If the Department continues to reject Malee's historical NRV data, Malee contends that the Department must reject Malee's historic normal cost allocation and, instead, use the same methodology that it used for Kuiburi in this review. The Department cannot rely on Malee's historic normal cost allocation, Malee argues, because as the Department stated in its Malee Preliminary Results Analysis Memorandum, its policy is "to not accept revenue factors which cannot be linked to actual sales data."[75] Malee states that its historic normal cost allocation does not meet this test and points to numerous statements from its POR2 Section D response, such as "the formula is based on a 'rough estimate of the relationship between the price of the final juice products and the cost of fresh fruit'"[76] and indicates that the ratio was devised for strategic reasons. Malee also points out that the Department noted in Malee's Verification Report that this allocation is based on estimations.[77] *See* Malee's Case Brief at 25-27.

Malee reiterates that use of the historic normal cost allocation is discriminatory, because the Department has in past proceedings used some form of NRV when other respondents have abandoned their internal cost allocations. Malee cites *Carpenter Technology Corp. v. United States* as proof that it is "incumbent upon Commerce to apply its rationale to all respondents similarly situated,"[78] *i.e.*, Malee should be treated the same as other respondents. Specifically, Malee believes it should be treated the same as Kuiburi. Malee claims that both it and Kuiburi attempted to provide the Department with NRV data this review period, yet, in Kuiburi's case, the Department chose to apply "facts available" to Kuiburi, which resulted in a lower percentage cost allocation for Kuiburi than Malee's calculated historical NRV. *See* Malee's Case Brief at 27-29.

By not treating the similarly situated Malee and Kuiburi the same way, "the Department penalized Malee through the imposition of an adverse methodology that bears no relationship to reality,"[79] according to Malee. Malee states the Department's treatment of Kuiburi was reasonable considering Kuiburi's circumstances. Malee also points out that the facts available the Department used are appropriate because there are reflective of historical industry experience prior to the imposition of the antidumping duty order and because the production process for solid pineapple and pineapple juice is firmly established and does not vary significantly from producer to producer. Therefore, the Department should apply neutral facts available to Malee using the same allocation used for Kuiburi.

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[75] *See* Malee Preliminary Results Analysis Memorandum at 5.

[76] *See* Malee's POR7 Supplemental Questionnaire Response (Jan. 17, 2003) at 43 and Exhibit 23.

[77] *See* Memorandum to Gary Taverman: Verification of the U.S. and Home Market Sales Information and the Cost Information in the Response of Malee Sampran Public Co., Ltd. in the 2001-2002 Administrative Review of Canned Pineapple Fruit from Thailand (June 5, 2003) at 27 (Malee's Verification Report).

[78] *See Carpenter Technology Corp. v. United States*, 22202 Ct. Int'l Trade LEXIS 76, SLIP OP. 2002-77 (Ct. Int'l Trade, July 30, 2002), citing *NEC Corp. v. U.S. Department of Commerce*, 151 F.3d 1361 (1998); *Melamine Chemical v. United States*, 732 F.3d 924,933 (1984); *Torrrington Co. v. United States*, 44 F.3d 1572, 1579 (1995).

[79] *See* Malee's Case Brief at 29.

See Malee's Case Brief at 27-28.

The petitioners, on the other hand, argue that the Department's choice for Malee's fruit cost allocation is well-reasoned, based on record evidence, and consistent with previous segments of this proceeding. The petitioners point out that there is a well-developed record regarding the Department's position on the allocation of fruit costs between sold pineapple fruit and juice. According to the petitioners, if 1) the Department determined that a company's normal books and records reasonably took into account the qualitative differences between pineapple parts and 2) the accounting methodology was historically used, the Department accepted that company's fruit allocation ratio. However, if a company's allocation did not reasonably account for the qualitative differences, the Department required the company to submit the data necessary to compute NRV.[80] Keeping this in mind, the petitioners argue, the Department should continue to use Malee's historic normal cost allocation and reject Malee's alternative allocations. *See* Petitioners' Rebuttal Brief for Malee Sampran Public Co., Ltd. (August 4, 2003) (Petitioners' Malee Rebuttal Brief) at 1-2.

Malee's new normal allocation must be rejected for the following reasons, according to the petitioners. First, it does not come from an appropriate time frame – *i.e.*, from "several years prior to the antidumping proceeding." Second, it was not historically used. The petitioners cite the Statement of Administrative Action (SAA) as proof that cost allocations must be demonstrated to be "historically utilized" and that Commerce will adjust costs appropriately if it determines that costs have been "shifted away from production of the subject merchandise." Finally, the petitioners point out that even Malee "{c}oncedes that this method is not linked to actual sales data." *See* Petitioners' Malee Rebuttal Brief at 2-3.

Regarding Malee's historic NRV submission, the petitioners contend that the Department has rightly chosen not to accept the fewer than five years worth of data that Malee has supplied. The petitioners cite the *LTFV Final Determination*, in which the Department sets out the ideal requirements for NRV, specifically, the sales data coming from "several years prior to the antidumping proceeding." Given the Department's stated requirements and the importance of the NRV allocation in this proceeding, argue the petitioners, the Department is effectively prevented from using Malee's incomplete data. Further, the petitioners comment that virtually all other respondents have been able to submit the full five years of data when asked. With regard to Malee not holding onto its data from 10 years ago, they point out that Malee has been a party to these proceedings since the LTFV investigation was initiated on June 28, 1994. The petitioners comment that in the *LTFV Final Determination*, the Department stated its intentions to gather several years of data for NRV in future administrative reviews. *See* Petitioners' Malee Rebuttal Brief at 3-5.

The petitioners argue that the only reason Malee is suggesting that the Department apply Kuiburi's neutral facts available ratio to itself is because it would result in a lower fruit cost and likely a lower margin for Malee. The petitioners contend that the Department's regulations state that it may use facts

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[80] *See POR7 Preliminary Results* at 38291, 38297-8.

available whenever necessary information is not available on the record.[81] This is not the case for Malee, the petitioners claim, since Malee's normal historic cost allocation is on the record and can be used by the Department. The petitioners contend that they are not aware of any investigation "where the Department has discarded the respondents' historical, reasonable, and verified cost data – data that was used in the original investigation and six subsequent administrative reviews – in favor of facts available data that is based on the average of four unaffiliated companies." *See* Petitioners' Malee Rebuttal Brief at 5.

Regarding Malee's historic normal cost allocation, the petitioners point out that the Department found during its verification that "Malee's 1994 Pineapple Report, created in the normal course of business, shows the use of the {historic normal cost allocation ratio} in Malee's normal records."[82] The petitioners question Malee's claims that the allocation is flawed since Malee created it and used it in the normal course of business.[83] The petitioners also point out that the ratio comes from the time period the Department prefers, *i.e.*, prior to the antidumping duty proceedings. Therefore, the petitioners argue that Department is right to continue to use this ratio for Malee's cost allocations. *See* Petitioners' Malee Rebuttal Brief at 5-6.

The petitioners also refute Malee's claims of dissimilar treatment in these antidumping duty proceedings. The Department revised TIPCO's normal fruit cost allocation to an NRV allocation in POR1 because TIPCO changed its normal allocation from one which accounted for qualitative differences to one which did not take into account the qualitative differences between pineapple parts, according to the petitioners. The Department, therefore, had to ask TIPCO to submit NRV data and, unlike Malee, TIPCO did submit the full five years of data. This reflects nothing more than the Department selecting the next best allocation in its preferred allocation hierarchy, the petitioners explain. *See* Petitioners' Malee Rebuttal Brief at 7-8.

With regard to Kuiburi, the petitioners argue that different treatment was warranted in this review because the Department determined that Kuiburi's current fruit cost allocation methodology is unusable. The Department has not made this determination for Malee. They further point out that Kuiburi could not submit a full five years of NRV data, mainly because it had no operations until February 21, 1992.[84] Because the company did not submit the full information, the Department did not accept Kuiburi's NRV data and had to move to facts available as the next best allocation among its preferred hierarchy. The petitioners argue that Malee's comparisons with Kuiburi fail when these facts are taken into account. *See* Petitioners' Malee Rebuttal Brief at 8-9.

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[81] *See* Section 776(a) of the Act and 19 CFR 351.308.

[82] *See* Malee's Verification Report at 27.

[83] *See* Petitioners' Malee Rebuttal Brief at 6.

[84] *See* Kuiburi's Supplemental Response at X-10.

Department's Position:

With regard to the Department's request that Malee resubmit its case brief, the Department finds that it properly rejected certain new factual information contained in Malee's original case brief. Under the Department's regulations, parties must submit new factual information in an administrative review no later than 140 days after the last day of the anniversary month (in this case, July 31, 2002, plus 140 days, or December 18, 2002). *See* Section 351.301(b)(1) of the Department's regulations. Malee's original case brief contained untimely new factual information: data that had been submitted by Malee and Kuiburi in prior administrative reviews. Although Malee argues that this information from prior reviews was submitted for purposes of argument only, the Department notes that the submissions at issue contained specific factual information that was intended to be used to evaluate a factual determination, namely Malee's fruit cost allocation ratio in this review. Therefore, even if the submitted information in the original case brief is a mixture of fact and argument, the Department believes that it is inappropriate to allow the submission of such factual data so late in the proceeding, well after the deadline for submission of new factual information. Moreover, the Department notes that Malee has been able to make an argument concerning the history of the Department's fruit cost allocation methodology without the untimely, new data.

Finally, Malee's argument that under section 351.104(a) of the Department's regulations the record necessarily includes the submissions from all prior segments of the CPF proceeding is incorrect. Under section 516A(b)(2) of the Act, the record is limited to material submitted in each particular segment of a proceeding. *Neuweg Fertigung GmbH v. United States*, 797 F. Supp. 1020, 1022 (Ct. Int'l Trade 1992).

Regarding Malee's fruit cost allocation, the Department has continued to use Malee's historic normal cost allocation to determine the company's fruit costs. The Department's long-standing practice, codified at section 773(f)(1)(A) of the Act, is to rely on a company's normal books and records if such records are in accordance with the home country's generally accepted accounting principles (GAAP) and reasonably reflect the costs associated with production of the subject merchandise. Since the LTFV investigation, the Department has found Malee's normal historic cost allocation to meet these criteria. Malee's arguments for abandoning the only cost allocation the Department has used for the company throughout the entire proceeding are not persuasive.

The Department cannot accept Malee's new normal books and records cost allocation. As the Department stated in the Malee Preliminary Results Analysis Memorandum: "Under our NRV regime, our policy has been to not accept revenue factors linked to revenue earned after the initiation of the Thai pineapple investigation and also to not accept revenue factors which cannot be linked to actual sales data."[85] Malee's new normal allocation fails on both of these counts, even by Malee's own

[85] *See* Malee's Preliminary Results Analysis Memorandum at 5.

admission.[86] The ratio data do not come from a period prior to the investigation of this case and are not tied to actual sales data.[87]

Malee argues that its historic normal cost allocation also fails because it is not tied to actual sales data. However, Malee fails to explain why the company continued to use this ratio until 1999 (during POR5). As the Department noted in the *LTFV Final Determination*, Malee's claim that its historic normal cost allocation methodology is based on estimations and certain strategic goals and therefore does not accurately reflect actual costs is unpersuasive. "An accounting methodology designed to achieve certain managerial goals does not *necessarily* imply that the employed methodologies result in an unreasonable reflection of costs, particularly where a company's accounting methodology had been approved by independent auditors."[88]

Furthermore, an important consideration for the Department, with regard to Malee's new normal allocation, is whether an accounting methodology, particularly an allocation methodology, has been historically used by the company. As the SAA indicates:

> Commerce also will consider whether the producer historically used its submitted cost allocation methods to compute the cost of the subject merchandise prior to the investigation or review and in the normal course of its business operation. Also, if Commerce determines that costs, including financing costs, have been shifted away from production of the subject merchandise, or the foreign like product, it will adjust costs appropriately, to ensure they are not artificially reduced.[89]

Malee's new normal allocation has not been utilized historically, nor do the data come from before the investigation of this case. The Department must be careful to ensure costs are not shifted away from the production of the subject merchandise. Since this allocation ratio does not meet the Department's requirements, we cannot ensure this and therefore cannot use this ratio.

It is also the Department's policy to not accept NRV allocations based on fewer than the five years of data in this proceeding.[90] In the LTFV investigation, the Department made clear that NRV data would

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[86] *See* Malee's Case Brief at 5.

[87] *See* Malee's Preliminary Results Analysis Memorandum at 5.

[88] *See LTFV Final Determination* at Comment 6.

[89] *See* SAA at 834-35.

[90] There were specific circumstances in the *Lumber Final Determination* that led the Department to develop the best NRV it could based on the evidence available on the record, including petitioner allegations that historical pricing data prior to the period of investigation was unusable because of claims that the Canadian softwood lumber industry operated in an environment of distorted prices for many years prior to the investigation. These circumstances are not present in this proceeding. *See Lumber Final Determination* at Comment 4.

be the next best information to normal books and records allocations that reasonably allocated fruit costs.[91] For that reason, while the Department may not have specifically asked Malee to provide NRV data in supplemental questionnaires, the company has been aware, since its participation in POR2, of the Department's reliance on NRV data in the absence of appropriate normal books and records. Every questionnaire from POR1 has included language asking respondents to submit NRV data.[92] Furthermore, the U.S. Court of Appeals for the Federal Circuit recently ruled on a respondent's responsibility to act to the best of its ability to comply with Department information requests:

> Compliance with the "best of its ability" standard is determined by assessing whether respondent has put forth its maximum effort to provide Commerce with full and complete answers to all inquiries in an investigation. While the standard does not require perfection and recognizes that mistakes sometimes occur, it does not condone inattentiveness, carelessness, or inadequate record keeping. It assumes that importers are familiar with the rules and regulations that apply to the import activities undertaken and requires that importers, to avoid a risk of an adverse inference determination in responding to Commerce's inquiries: (a) take reasonable steps to keep and maintain full and complete records documenting the information that a reasonable importer should anticipate being called upon to produce; (b) have familiarity with all of the records it maintains in its possession, custody, or control; and (c) conduct prompt, careful, and comprehensive investigations of all relevant records that refer or relate to the imports in question to the full extent of the importers' ability to do so.[93]

Malee has known since POR2 that if it wanted to supply NRV data it needed records from a certain

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[91] "Ideally, such a NRV methodology would compare historical cost and sales data for pineapple fruit products over a period encompassing several years prior to the antidumping proceeding and also would include data for markets where allegations of dumping have not been lodged. . . . While it would have been preferable to develop an allocation methodology based on historical NRV data . . . , we were unable to do so in this investigation because the data were not available. . . . However, we intend to do so in any future administrative reviews if an order is issued." *See LTFV Final Determination* at Comment 6.

[92] "If your company normally uses a cost accounting system based on actual costs, use that system for purposes of computing your submitted COP and CV amounts. Similarly, if your company normally uses a standard cost accounting system, use that system for purposes of computing COP and CV; in such case, however, ensure that you have allocated to the merchandise under consideration all variances resulting from differences between standard and actual production costs. . . . EXCEPTION TO ABOVE INSTRUCTION: As you may be aware, the Department has determined in previous segments of this proceeding that joint production costs *(i.e.*, pineapple and pineapple processing costs) cannot be reasonably allocated to canned pineapple on a weight basis. . . . Therefore, to the extent that your POR records allocate joint production costs to canned pineapple on a weight basis, for reporting purposes please reallocate your joint production costs (*i.e.*, pineapple and pineapple processing costs) based on the net relative realizable value (NRV) of canned pineapple versus the other joint products produced. The net realizable value should be computed as the value of annual production for each joint product (*i.e.*, annual production quantity times average annual per unit sales price to unaffiliated parties during the same year) less the costs incurred after the split-off point related to each specific join product. Provide separate schedules which calculate the net realizable values for 1990, 1991, 1992, 1993 and 1994. . . ." *See* Part III, Section D Questionnaire.

[93] *See Nippon Steel Corp. v. United States*, 337 F.3d 1373 1382; (Fed. Cir. 2003) (*Nippon Steel*).

time period. Therefore, the Department does not find Malee's explanation that certain records are missing due to a Thai records retention law a persuasive reason for Malee to not have kept records that it needed to fulfill the Department's NRV requirements.

Malee is correct in noting that Kuiburi has been exempted from the five-year NRV data rule. This is because, unlike Malee, the company did not have canned pineapple operations until February 21, 1992,[94] not because the company had misplaced records. Furthermore, regarding Malee's claim of dissimilar treatment from Kuiburi, the Department is using different fruit cost allocations for these companies because their cases have differing sets of circumstances. Unlike Malee, Kuiburi does not have alternative data on the record in this review that meets the requirements of the Department's established, preferred hierarchy for fruit cost allocations. Consequently, the Department used facts available with regard to Kuiburi. Malee's historic normal cost allocation, on the other hand, allocates fruit costs in its normal accounting records on a basis that reasonably takes into account qualitative differences between pineapple parts used in CPF versus juice products. This is why, after finding Malee's reported new normal allocation and its reported NRV allocation unacceptable, the Department is using Malee's historic normal cost allocation.

With regard to TIPCO, as the petitioners pointed out, the main difference between Malee and TIPCO is that when TIPCO changed its normal allocation methodology to one which the Department found unacceptable in POR2, TIPCO then supplied the Department with the full five years of NRV data that was required. Malee has been unable to provide the same information, so the Department has continued to use Malee's historic normal cost allocation for determining Malee's fruits costs, even in light of the fact that Malee has more recently changed the way it allocates fruit costs in its normal books and records. It should be noted that Malee's historic allocation not only meets the Department's criteria but surpasses most other respondents' allocation methodologies. It surpasses them because Malee's allocation represents the Department's first choice in its preferred fruit cost allocation hierarchy, that is, normal books and records methodology that takes the qualitative differences of pineapple under consideration. Since POR1, no other company has supplied the Department with its first choice in the allocation hierarchy.

Rather than treating Malee unfairly, the Department has been remarkably consistent in its treatment of Malee. Since the POR, the Department has relied upon Malee's normal historic ratio to allocate its fruit costs. Absent more persuasive evidence to change to a new ratio, the Department will continue to rely on the one allocation that is based on the respondent's books and records prepared in accordance with its home country GAAP and reasonably reflects the costs associated with production of the subject merchandise.

IV. ISSUES SPECIFIC TO TIPCO

Comment 15: Proposed Interest Income Offset

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[94] *See* Kuiburi's Supplemental Response at X-10.

According to the petitioners, TIPCO did not calculate the financial expense ratio correctly because it used as an offset its total interest income for 2001, rather than only its short-term income. The petitioners state that TIPCO decreased its total interest expense by Baht 3,850,789, an amount which was obtained from TIPCO's 2001 audited financial statements and was described as Interest Income in Exhibit A-16. The petitioners argue that the Department should not allow TIPCO's interest income offset because it failed to demonstrate that the interest income was linked to short-term investments.

The petitioners also cite the recent preliminary determination of the investigation of *Certain Durum Wheat and Hard Red Spring Wheat from Canada, 68 Fed. Reg. 24,707 (May 8, 2003)* (*Wheat from Canada*) in which the Department did not allow an offset for interest income because the respondent was unable to prove that the income was related to short-term interest. As with the investigation mentioned above, the petitioners state that there is no evidence on the record that would suggest that TIPCO's interest income offset was related to short-term investments.

Department's Position:

Unlike the *Wheat from Canada* investigation, the Department believes that there is enough evidence on the record to justify TIPCO's interest income offset in the calculation of its financial expense ratio. The Department has examined evidence on the record that suggests that TIPCO's interest income was linked to short-term investments. In addition, the Department has reviewed evidence within TIPCO's 2001 financial statements.[95]

The Department has been unable to find any evidence on the record that would suggest that TIPCO's interest income is linked to long-term investment income.[96] Since the petitioners did not provide a link between TIPCO's interest income and long-term investment income to the Department in their Case Brief,[97] the Department granted the offset.

Comment 16: G&A Expenses

The petitioners argue that TIPCO's expenses related to its restructuring business fee should be included in the G&A expenses. Historically, the petitioners state, the Department has not allowed the deduction of the fee from TIPCO's G&A expenses. Specifically, the petitioners cite the *Notice of Final Results of Antidumping Duty Administrative Review and Rescission of Administrative Review in Part: Canned Pineapple Fruit from Thailand*, 66 FR 52744 (October 17, 2001) and the accompanying

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[95] *See* Response of The Thai Pineapple Public Company, Ltd., to the Commerce Department's Section A Questionnaire, at Exhibit A-16.

[96] *See* TIPCO's 2001 Audited Financial Statement within Section A Questionnaire, at Exhibit A-16, p. 1. (e.g. TIPCO's "Cash at hand and at banks" provides evidence that TIPCO had liquid assets that were readily available for company officials.)

[97] *See* Petitioners' TIPCO Case Brief (July 28,2003) at 2-4.

Issues and Decision Memorandum at Comment 17, where the Department categorized these expenses as G&A expenses, and found that they should not be excluded from the calculation of the G&A expense ratio.

Department's Position:

As described by TIPCO,[98] the business fee was an expense incurred[99] when it obtained aid to restructure the company. We reviewed TIPCO's documents pertaining to the fee during the Department's verification of TIPCO for the current POR.

Officials at TIPCO's headquarters confirmed that the fee was entered into a revenue account for 2002 and requested that the Department offset its G&A expenses by the amount of the fee. We explain why TIPCO entered this fee into a revenue account in the TIPCO Analysis Memorandum. While we agree that it is appropriate to reduce TIPCO's G&A expenses by the amount of the revenue, 2001 G&A expenses cannot be offset with income earned in 2002. Because the POR falls between two fiscal years for TIPCO, and we use 2001 fiscal year data to calculate G&A expenses, we are unable to make an adjustment for G&A expenses for income earned in 2002.[100]

Comment 17: Direct Materials Cost

In reference to the Department's request that the respondent report taxes paid on purchases of raw materials, the petitioners state that TIPCO did not demonstrate that the value-added tax (VAT) refunds granted to TIPCO are linked to its COM. The petitioners indicate that TIPCO's response that it received "a refund for VAT expenses incurred in the production of finished products exported"[101] is proof that TIPCO's VAT refunds are not linked to its COM and instead linked to the value of its exports.

Furthermore, the petitioners argue that the Department found in a previous review that TIPCO's VAT refunds are not linked to its COM. Specifically, the petitioners rely on the *Notice of Final Results and Partial Rescission of Antidumping Duty Administrative Review: Canned Pineapple Fruit from*

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[98] *See* TIPCO's Section D Questionnaire, at D-40.

[99] Due to the proprietary nature of this issue, additional information cannot be listed here. *See* TIPCO Analysis Memorandum, dated concurrently with this notice, for an explanation.

[100] *See Final Results of Redetermination Pursuant to Court Remand, U.S. Steel Group v. United States, Court Number 95-09-01144*, at 4. (The Department's normal method for allocating G&A expenses is to "calculate a G&A rate by dividing the company's G&A expenses by the total cost of goods sold of that company during a given financial statement period.")

[101] See Petitioners' TIPCO Case Brief at 6.

Thailand[102] *(Third Review Final Results)* in which the Department failed to find a link between the tax rebates and the COM. Subsequently, the Department rejected TIPCO's request to allow for an adjustment of the tax rebates. The petitioners allege that the issue described above in the third review is identical to the VAT refunds claimed by TIPCO in this review. As a consequence, the petitioners request that the Department add 7 percent, the Thai VAT rate, to TIPCO's DIRMAT.

Department's Position:

The Department has reviewed the petitioners' reference to the *Third Review Final Results* and has concluded that the petitioners are confusing two distinct internal tax programs in which TIPCO participates. There are two rebates that TIPCO is eligible to receive from the Thai government. The first is the Blue Corner Rebate and the second is a VAT refund. Both refunds are granted to TIPCO because of its export activities.

In the third review, the Department disallowed the Blue Corner Rebate as a cost adjustment because the Department did not agree with the respondent's request to adjust for the value of certain tax certificate revenues in the calculation of the COM. Furthermore, the Department did not find a link between the tax rebates and the respondent's COM that would allow it to treat the factor as a cost adjustment.[103] Since the Department's decision to disallow an adjustment for these tax certificate revenues in the third review, TIPCO has not attempted to make an adjustment for this refund. TIPCO's responses to the Department's Section D Questionnaire[104] demonstrate that it is complying with the Department's decision in the current review.

TIPCO receives VAT refunds from the government for VAT expenditures incurred during the production of goods that are ultimately exported. However, TIPCO explicitly stated that it "excluded the VAT taxes paid on raw material purchases from its Section D cost calculations."[105] Moreover, TIPCO's calculation of DIRMAT excludes internal taxes.[106] TIPCO has met the Department's request to exclude internal taxes from its DIRMAT.[107] Therefore, the Department is satisfied with TIPCO's responses and sees no need to add 7 percent to the calculation of its DIRMAT.

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[102] See Petitioners' TIPCO Case Brief at 6.

[103] See *Notice of Final Results and Partial Rescission of Antidumping Duty Administrative Review: Canned Pineapple Fruit from Thailand Third Review Final Results*, 64 Fed. Reg 69,481 (December 13, 1999).

[104] *See* TIPCO's Section D Questionnaire Response at D-8 and D-37.

[105] *See* TIPCO's Section D Questionnaire Response at D-37.

[106] *See* TIPCO's Section D Questionnaire at D-47.

[107] See the Department's Section D questionnaire at Instructions for Submitting COP and CV Data File Fields 3.0 and 10.0.

Comment 18: Credit Expenses

The petitioners argue that TIPCO did not properly follow the Department's instructions for the calculation of U.S. credit expenses. According to the petitioners, TIPCO failed to apply the interest rate it received on its short-term loans denominated in U.S. dollars for the entire first six months of the POR. Because TIPCO did not follow the Department's request to recalculate its credit expense in a supplemental questionnaire, the petitioners argue that the Department should refuse to take any deduction for TIPCO's comparison market sales and deduct credit on all of its U.S. sales using the short-term rate for the POR.

Department's Position:

The Department requested that TIPCO "report the unit cost of credit computed at the actual cost of short-term debt incurred."[108] Although TIPCO had short-term borrowing in U.S. dollars within the first six months of the POR,[109] TIPCO did not use its borrowing rate to calculate its U.S. credit expenses. Instead, TIPCO applied the borrowing rate to the first few weeks of the POR and applied a rate obtained from the Federal Reserve to the remaining weeks of the first half of the POR. TIPCO then obtained a weighted-average rate and applied this rate to the first half of the POR. TIPCO applied a rate that it obtained from the Federal Reserve for the last half of the POR.

Subsequently, the Department issued TIPCO a supplemental questionnaire[110] regarding its application of two interest rates for the POR and requested that TIPCO apply the borrowing rate for its U.S. credit expenses for the entire POR. TIPCO replied to the Department's request by explaining that it continued to believe its methodology for calculating U.S. credit expenses was the most appropriate.[111]

Although TIPCO's actual short-term borrowing lasted only for the first few weeks of the POR, the Department has historically calculated credit expenses based on the respondent's actual borrowing experience when the respondent has short-term borrowing in the relevant market.[112] TIPCO's Exhibit

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[108] *See The Department's Anti-Dumping Duty Questionnaire for the Seventh Administrative Review, Section C (Sept. 19, 2002).*

[109] *See Response of The Thai Pineapple Public Company, Ltd. ("TIPCO") to the Commerce Department's Section C Questionnaire,* January 24, 2003 at Exhibit C-8.

[110] *See* The Department's Supplemental Questionnaire issued on January 10, 2003.

[111] *See* TIPCO's Supplemental Response (January 24, 2003) at 2.

[112] *See* Import Administration's Policy Bulletin 98.2 , "Imputed Credit Expenses and Interest Rates" at 3 (February 23,1998) and *Notice of Final Determination of Sales at Not Less Than Fair Value: Expandable Polystyrene Resins from the Republic of Korea*, 65 FR 69284, (November 16, 2000) and accompanying Decision Memorandum at Comment 9.

C-8 provides evidence that it had short-term borrowing experience. The Department applied TIPCO's borrowing rate to its U.S. credit expenses for the entire POR.

IV. ISSUES SPECIFIC TO TPC

Comment 19: The Appropriate Basis for Determining Normal Value

TPC argues that the Department should use actual cases rather than 20-ounce equivalents to determine the appropriate third-country comparison market. According to TPC, given that the volume and value of sales on an actual case basis indicates that the Netherlands is the largest third-county market, the Department should find that it is the appropriate third-country comparison market in this review. TPC also argues that under section 351.404(c)(2) of the Department's regulations there is a "particular market situation" in Japan that makes it unsuitable as a third-country comparison market, thus further enhancing the Netherlands as the appropriate third-country comparison market. Finally, TPC argues that the Department should have examined similarity and "other factors" under section 351.404(e) of the Department's regulations, consideration of which TPC claims necessitates a finding that the Netherlands is the appropriate third-country comparison market.

Comment 19a - The Proper Unit of Measure for Determining the Volume of Third-Country Sales

TPC alleges that the Department erred in the *POR7 Preliminary Results* by examining TPC's volume and value of sales on a 20-ounce equivalent basis for the purpose of determining the appropriate third-country comparison market. TPC claims that reporting the volume of sales on an actual case basis is far superior to reporting them on a 20-ounce equivalent, kilogram, or metric ton basis.[113] TPC states that it provided the Department with the volume and value of its sales to the United States and to each of its three largest third-country markets on an actual case basis and that the Department should use this information to determine the appropriate third-country comparison market.[114] Based upon the sales of actual cases, TPC claims that the Netherlands is clearly the largest third-country market.

TPC makes three arguments in support of its contention that the Department should have used actual cases as the basis for determining the appropriate third-country comparison market. TPC first argues that calculating its volume and value of sales on a 20-ounce equivalent basis does not provide a uniform unit of measure across manufacturers. TPC claims that, because different CPF producers calculate 20-ounce equivalents differently, it does not allow for an objective comparison throughout the industry and thus the largest third-country market may be "different for different manufacturers selling precisely the

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[113] *See* TPC's Case Brief at 12.

[114] *See id.* at 2.

same quantity and the same product mix to different markets."[115] In contrast, TPC claims that reporting volume on the basis of actual cases sold provides a fixed and determinable result across countries.[116]

Second, TPC argues that "there are significant factors operating on the value of a case of CPF that are independent of the content of pineapple in the can," and thus "it is appropriate to calculate volume on an actual case basis."[117] TPC claims that the costs of the can and packing media are a substantial portion of the cost of CPF and are factors not dependent upon, and which may move inversely to, the quantity of pineapple in the can. Consequently, TPC contends that "neither the cost, nor the price, of a case of CPF moves in direct relationship to the quantity or weight of pineapple in the can,"[118] making the calculation of 20-ounce equivalents an inappropriate basis for determining the volume and value of sales.

Finally, TPC argues that the Department should permit the reporting of the volume and value of sales in a manner that is "easily derived from a company's ordinary books and records."[119] According to TPC, in the pineapple industry the common unit of measure used in the ordinary course of trade is actual cases.[120] TPC states that other than for the purpose of allocating fresh fruit costs to its ending finished goods inventory, neither it nor its affiliates calculate 20-ounce equivalents in the ordinary course of trade.[121]

The petitioners state that TPC's failure to provide the Department the volume of sales in each of its three largest third-country markets is an example of TPC refusing to provide the Department information in the form and manner requested.[122] The petitioners claim that every respondent, including TPC, has reported its sales on a 20-ounce equivalent basis in either this review or in prior reviews, and that this is the first time TPC has challenged the practice. Finally, the petitioners argue that TPC waited until April 4, 2003, before it brought to the Department's attention that it reported its sales volume in its October 22, 2002, Section A response in actual cases, rather than on a 20-ounce equivalent basis as it had done in prior reviews.

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[115] *Id*. at 12.

[116] *See id*. at 8.

[117] *Id*. at 10.

[118] *Id*. at 2.

[119] *Id*. at 12.

[120] *See id*. at 10.

[121] *See id*. at 10.

[122] *See* Petitioners' TPC Case Brief at 2.

Department's Position:

When, as in this case, there is no viable home market, section 351.404(e) of the Department's regulations instructs the Department to select a third-country comparison market on which to base normal value. In conducting this analysis, section 351.404(e) instructs the Department to examine three factors, one of which is the volume of sales in each third-county market. Section A of the Department's questionnaire instructs respondents to "{r}eport the value of all sales in U.S. dollars and convert your quantity of sales to a uniform unit of measure."[123] In our April 16, 2003, letter to TPC, we clearly explained why 20-ounce equivalent, or some other standard unit of measure, is necessary to conduct a proper third-country analysis under section 351.404(e) of the Department's regulations, and why measuring the volume and value of units sold on the basis of actual cases is not appropriate. In that letter, the Department informed TPC:

> that in reporting the volume of sales to the United States and to each of your largest third-country markets on the basis of actual cartons, you have still failed to comply with our request for sales data based on a common unit of measure that allows for a proper comparison of the quantity sold to the different markets. Because "actual" cases may contain varying quantities of cans in varying can sizes, *e.g.*, 8-oz., 15-oz., 20-oz., 30-oz. or 108-oz. cans, the use of actual cases means that a varying, and ultimately unknown, amount was reported for purposes of determining the proper comparison market. Therefore, your use of actual cases sold is meaningless in terms of providing a basis for comparing the volume sold between different markets. In addition, we do not agree when you state in your April 3, 2003 letter that conversion to 20-oz. equivalent cartons would be inappropriate and "not practicable." On the contrary, because of the differences in weights across products due to the proportions of pineapple and packing media, conversion to some form of common unit of measure is the only way in which a comparison of the volumes sold in different markets is possible. We note that in prior reviews, you reported your quantity sold to different markets based on 20-oz. equivalent cartons.[124] Considering the manner in which you have reported the third-country volumes and values sold we are still unable to determine the appropriate comparison market for this review.[125]

TPC's argument that measuring the sales volume of CPF on a 20-ounce equivalent, kilogram, or metric ton basis does not provide a "uniform unit of measure" throughout the CPF industry is irrelevant. The purpose of reporting the volume and value of sales using a comparable unit of measure is not to compare the sales between different manufacturers, but to compare the volume and value of sales of a single manufacturer across different markets. Therefore, it is of no consequence if different

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[123] Section A question 1(a) of the Department's questionnaire.

[124] *See e.g.*, TPC's Section A Response (October 5, 2001) at Exhibit 1 (placed on the record in this review by memorandum from Charles Riggle to the File, dated April 16, 2003).

[125] April 16, 2003, letter from the Department to TPC.

manufacturers calculate 20-ounce equivalents differently as argued by TPC. For the purpose of determining the appropriate third-country market, what is important is that the unit of measure selected provides a common unit of measure that will account for the difference in weight, the most important product characteristic, across products. Similarly, for this reason, TPC's argument that CPF is not a homogeneous product and, therefore, should not be measured in 20-ounce equivalents is misplaced. The very reason CPF must be reported on a 20-ounce equivalent or other comparable per-unit basis, is because the weight and number of cans per case varies depending upon can size. Therefore, the volume must be standardized for comparison purposes.

Finally, there is ample evidence on the record contradicting TPC's argument that reporting its volume and value of sales on a 20-ounce equivalent basis is something that cannot be "easily derived from {TPC's} ordinary books and records."[126] TPC concedes, in its case brief, that it calculates 20-ounce equivalents for the purpose of allocating fruit costs to ending inventory.[127] Additionally, in this review, prior to the appropriate third-country comparison market becoming a contentious issue, TPC proposed "to convert all sales to 24x20 oz. equivalents, as it does in its own cost accounting system."[128] In describing its proposal to calculate its sales for each of its third-country markets on a 20-ounce equivalent basis, TPC mentioned nothing of the issues it now claims makes such a calculation improper,[129] and goes so far as to include the conversion factors necessary to convert actual cases to 20-ounce equivalents.[130] Furthermore, prior to this review, TPC did not object to reporting its volume and value of sales on a 20-ounce equivalent basis. It was only after the Department began considering the appropriateness of Japan as a possible third-country comparison market that TPC began objecting to the use of 20-ounce equivalents. As pointed out by both the Department in its *POR7 Preliminary Results*[131] and by the petitioners in their case brief,[132] in past reviews TPC has repeatedly provided its volume and value of sales on a 20-ounce equivalent basis for each of its three largest third-country markets, including for its sales to Japan. In fact, as part of its Sections B and C responses for this review, TPC submitted sales databases for the Netherlands and the United States that included sales

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[126] *See* TPC's Case Brief at 12.

[127] *See id*. at 10.

[128] *See* TPC's Combined Section A Response (November 22, 2002) at 48.

[129] *See* TPC's Case Brief at 10.

[130] *See* TPC's Combined Section A Response (November 22, 2002) at Exhibit A-3.

[131] *See POR7 Preliminary Results* at 38294. *See also*, Memorandum from Charles Riggle, Program Manager, Office 5, to File, Concerning Seventh Administrative Review of Canned Pineapple Fruit from Thailand (April 16, 2003).

[132] *See* Petitioners' TPC Case Brief at 3.

data on a 20-ounce equivalent basis, but it refuses to provide the same for Japan.[133]

Comment 19b - The "Particular Market Situation" In Japan

TPC argues that under section 351.404(c)(2) of the Department's regulations a "particular market situation" exists in Japan that prevents the Department from making a "proper comparison" between the foreign like product sold in Japan and the subject merchandise sold in the United States. TPC contends that the Department erred in its *POR7 Preliminary Results* by not addressing Japan's "particular market situation" under section 351.404(c)(2) and that it should do so in its final results.[134] TPC claims that the market organization and the existence of an import protection scheme for domestic pineapple in Japan creates a "particular market situation" that makes Japan inappropriate for consideration as a third-country comparison market.

TPC argues that the market organization in Japan is different and more complex than that in the United States. TPC states that in the United States and the Netherlands its non-direct sales are to affiliated customers who either sell to an unaffiliated customer, or, in a back-to-back transaction, sell to a second affiliated customer who then sells to an unaffiliated customer.[135] Also, TPC states that the types of customers in both the United States and the Netherlands are large supermarket chains, local distributors, and large wholesalers.[136] In contrast, TPC claims that in Japan there are multiple sales to and between affiliates before there is a sale to an unaffiliated customer and that the sales of foreign like product are to small local warehouses and supermarkets. TPC argues that the Department has stated a preference for making sales comparisons at the same level of trade and for the same class of customers, and that although the Department is able to make adjustments for some of the differences mentioned,[137] the complex nature of the distribution system in Japan "makes such comparisons unavailable."[138]

TPC additionally argues that the system of import protection for domestic pineapple in Japan also contributes to there being a "particular market situation" under section 351.404(c)(2) of the Department's regulations. According to TPC, the import protection scheme distorts the cost and pricing of CPF in Japan and to calculate its effect would require a "special economic study beyond the

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[133] *See* TPC's Supplemental Section B and C responses and the accompanying sales databases for the United States and the Netherlands (March 19, 2003).

[134] *See* TPC's Case Brief at 17.

[135] *See id*. at 15.

[136] *See id*. at 15.

[137] *See id*. at 16. To support its argument, TPC cites to *Certain Welded Carbon Steel Pipe and Tube from Turkey*, 65 Fed. Reg. 6159, 6161 (Feb. 8 2000) and *Certain Pasta from Turkey*, 61 Fed. Reg. 30309, 30321 (June 14, 1996).

[138] TPC's Case Brief at 16.

scope of an antidumping duty investigation."[139] According to TPC, Japanese importers must buy a certain amount of Okinawan pineapple for every purchase of imported pineapple. TPC claims that the quality of the domestic pineapple is not as good as the imported pineapple and that it loses money on each sale of domestic pineapple in Japan. Therefore, importers must apply a surcharge on the imported pineapple to recoup their loses.

The petitioners make two arguments against TPC's claim that a "particular market situation" exists in Japan under section 351.404(c)(2) of the Department's regulations. First, the petitioners allege that TPC has selectively chosen data about the Japanese market that will help its case while failing to provide the Department with a complete Section A and B. The petitioners claim that because of TPC's selective reporting of information the Department does not need to consider its "market situation" argument. As support for their position the petitioners rely on *Chinsung Indus. Co. v. United States*, 704 F. Supp. 598, 602 (CIT 1989) and *Pistachio Group of the Association of Foods Indus. v. United States*, 671 F. Supp.31, 40 (CIT 1987). Next, the petitioners argue that the Department does not need to consider TPC's argument that a "particular market situation" exists in Japan because TPC first raised the argument on April 24, 2003, long after the statutory deadline set in section 351.301(d)(1) of the Department's regulations and without the required supporting documentation.

Department's Position:

Section 351.404(c)(2) of the Department's regulations provides that the Department may decline to consider a third-country comparison market in its analysis if a "particular market situation exists that does not permit a proper comparison with the export price or constructed export price. . . ." In TPC's October 23, 2002, TPC-Only Section A response, it argued that Japan was not "suitable for comparison purposes" due to its market organization and system of import protection, but TPC did not indicate that it was making these arguments in the context of section 351.404(c)(2) or supply the Department with supporting documentation. While we disagree with the petitioners' argument that a full Section A and B response for Japan is necessary for the Department to make a "particular market situation" determination under sections 351.404(d) and 351.301(d)(1) of the Department's regulations, TPC did not provide the Department with any supporting factual information beyond its allegation that the market organization and import protection schemes exist. Moreover, the issues raised by TPC do not make Japan unsuitable as a comparison market.

Comment 19c: Determining the Appropriate Third-Country Comparison Market Under Section 351.404(e) of the Department's regulations

TPC argues that absent information regarding the actual volume of sales in Japan and the Netherlands, the Department should have made an adverse inference that Japan was the largest third-country market by volume of sales, and then proceeded to conduct an analysis of product similarity and "other factors" under section 351.404(e) of the Department's regulations. TPC argues that an analysis of these two

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[139] *Id*. at 17.

factors necessitated a "finding that the Netherlands was the most appropriate comparison market, even if the volume sold there was slightly less than that sold to Japan."[140]

According to TPC, the foreign like product sold in the Netherlands is more similar to the subject merchandise than is the foreign like product sold in Japan.[141] TPC states that the listing of similarity of merchandise first in section 351.404(e) as a criterion to be considered by the Department when determining the appropriate third-country comparison market also suggests that it is first in the order of importance. TPC claims that when analyzing the similarity between the subject merchandise and the foreign like product sold in the Netherlands and Japan, based solely upon can size and form, "there is a much greater overlap of identical or similar product in the Netherlands than there is in Japan."[142] As such, TPC argues that in accordance with prior practice,[143] based upon similarity alone, the Department should find the Netherlands to be the appropriate third-country comparison market even if Japan is the larger market by volume.[144]

TPC also argues that the market organization, complex channels of distribution, and system of import protection for domestic pineapple in Japan, that create a "particular market situation" under section 351.404(c)(2) of the Department's regulations, are also "other factors" under section 351.404(e) of the Department's regulations that should be considered by the Department in selecting the appropriate third-country comparison market. As it stated in Comment 19b, TPC argues that these factors support the selection of the Netherlands as the appropriate third-country comparison market.

The petitioners allege that TPC's argument that the Department should have made an adverse inference under section 351.404(e) of the Department's regulations by assuming that Japan was the largest third-country market and then proceeded to an analysis of product similarity and "other factors" is incorrect. The petitioners argue that consideration of product similarity and "other factors" under section 351.404(e) is conditioned upon having complete Section A and B responses for the countries in question.[145] The petitioners also contend that TPC's argument that the products sold in the Netherlands are more similar to those sold in the United States than are those sold in Japan is flawed because the record regarding the products sold in Japan is undeveloped and incomplete. Finally, the petitioners state that they have demonstrated that most of TPC's sales in the Netherlands were made

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[140] *Id*. at 18.

[141] *See id*. at 18 and 19.

[142] *Id*. at 19.

[143] *See id*. at 20, footnote 29 (citing to *Stainless Steel Bar from India*, 65 Fed. Reg. 12209, 12212 - 13 (Mar. 8 2000) (*Indian Steel Bar*)).

[144] *See id*. at 20.

[145] *See* Petitioners' TPC Case Brief at 7.

outside the ordinary course of trade and should be rejected as below cost sales, while most of TPC's sales in Japan were made within the ordinary course of trade. According to the petitioners, this would result in Japan providing the more "favored price-to-price comparisons of 'identical' and 'most similar' merchandise."[146]

Department's Position:

As stated in the *POR7 Preliminary Results*, it is the Department's practice to consider "{a}ll the criteria under section 351.404(e) of the Department's regulations, product similarity, volume of sales, and other factors, are considered together when determining the appropriateness of a third-country comparison market."[147] However, even if the Department were to apply an adverse assumption that Japan was the largest third-country comparison market by volume, an analysis based solely upon similarity and "other factors" does not, as claimed by TPC, mandate a finding that the Netherlands is the proper comparison market.

Regarding the similarity of merchandise, we disagree with TPC's argument that because similarity is first in the list of three factors to be considered under section 351.404(e) of the Department's regulations it is therefore the most important of the three factors. There is nothing in section 351.404(e) that indicates that one factor is to be given more weight in the Department's analysis than any other factor. As previously stated, the Department examines all three factors when conducting a third-country market analysis. We also disagree with TPC's analysis and conclusion that the foreign like product sold in the Netherlands is more similar to the subject merchandise sold in the United States than is the foreign like product sold in Japan. TPC bases its conclusion upon an analysis of only two of the four characteristics in the product characteristics hierarchy for this proceeding.[148] To appropriately determine the similarity between merchandise sold in two countries, the Department examines all of the product characteristics that make up a CONNUM. In this proceeding the product characteristics are weight, form, type, and grade. In addition, the Department examines the contemporaneity of the sales of the foreign like product with that of the subject merchandise to which it is being compared. While the Department disagrees with the petitioners' assertion that a complete Section B response is required to conduct this analysis, the Department needs at least a listing of the months in which each CONNUM was sold in the comparison market. TPC did not provide this information in its Section A response. Therefore, even if the Department were to deviate from its practice of examining all three factors under section 351.404(e) of the Department's regulations, it would not be able to reach a decision on product similarity based upon the available information in this case.

Finally, the Department disagrees with TPC that an analysis of Japan's market organization and system

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[146] *Id*. at 7.

[147] *See POR7 Preliminary Results* at 38294.

[148] *See* TPC's Case Brief at 19.

of import protection as "other factors" under section 351.404(e) of the Department's regulations supports a finding that the Netherlands is the most appropriate third-country comparison market. As we explained in Comment 19b these issues alone would not make Japan unsuitable as a comparison market.

Comment 20: Application of Adverse Facts Available

TPC claims that the Department erred by applying adverse facts available (AFA) in its *POR7 Preliminary Results*. First, TPC claims that it did not impede the Department's review in its reporting of its affiliation and sales to unaffiliated customers. Second, TPC argues that there are a number of reasons why it was unable to provide the Department with a listing of its sales to unaffiliated customers in Japan, and that the Department set an unreasonable deadline for the submission of the listing. Finally, TPC claims that the Department was given notice early on in this segment of the proceeding that it was reporting its volume and value of sales in actual cases rather than on a 20-ounce equivalent basis.

Comment 20a: TPC Withheld Information and Impeded the Review

TPC contends that contrary to the Department's finding in its *POR7 Preliminary Results*, TPC did not impede the Department's review. TPC claims that the Department stated in its *POR7 Preliminary Results* that TPC impeded the review by filing its initial response as if it was not affiliated with Mitsubishi International Corporation (MIC) and Princes Foods B.V. (Princes). TPC argues that because of changes in Mitsubishi Corporation's (MC) ownership of TPC and its representation on TPC's board, TPC was acting within its rights by filing its TPC-only Section A Response on October 23, 2002, premised upon it not being affiliated with MIC and Princes. TPC also claims that because the final results of POR 6 were still pending when it filed its Section A Response, and because a ruling in POR 6 does not control the disposition of the same issue in this review, it was not impeding the review by filing its TPC-Only Section A response.[149]

Next, TPC claims that the Department noted in the *POR7 Preliminary Results* that it impeded the review by filing a Combined Section A Response reporting its sales to affiliated resellers and also by requesting extensions to comply with the Department's request that it report only sales to unaffiliated customers. TPC argues that in previous segments of this proceeding it consistently reported MC's and Mitsubishi Food Sales Co., Ltd./Mitsubishi Beverage and Food Sales Co., Ltd.'s sales to its affiliated resellers Ryoshoku and Ryoshoku Key Wholesalers Group (RKG), rather than Ryoshoku's and RKG's sales to unaffiliated customers. TPC claims that in previous segments it did not report these affiliates' sales to unaffiliated customers due to the problems, detailed in Comment 19b, that these companies face in compiling the required data. Finally, TPC claims that none of the aforementioned affiliated resellers has previously participated in this proceeding.

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[149] In its case brief for the *POR6 Final Results*, TPC challenged the Department's finding in the *POR6 Preliminary Results* that TPC was affiliated with MIC and Princes.

The petitioners allege that TPC impeded the Department's review by failing to initially file a consolidated response on behalf of itself and its affiliates. The petitioners claim that when there is a ruling by the Department that has been consistently followed, and that ruling is challenged in a particular segment of a proceeding, parties are required to comply with the challenged ruling until the Department makes a final determination. The petitioners argue that TPC also impeded this review by failing to initially report resales by affiliates to unaffiliated customers. The petitioners point out that the Department's standard questionnaire requests that respondents provide resales by affiliates and the fact that TPC may not have reported resales by affiliates in previous reviews does not excuse it from doing so in this segment.

Department's Position:

TPC mischaracterizes the Department's reasoning in the *POR7 Preliminary Results* as finding that TPC impeded the Department's review by filing its initial Section A response based upon the premise that it was not affiliated with MIC and Princes. Given the circumstances of this particular case,[150] it may not have been improper for TPC to file its Section A response as if it were not affiliated with MIC and Princes.[151] However, as clearly stated by the Department in its *POR7 Preliminary Results*, once the Department instructed TPC in its November 14, 2002, letter to submit its responses as being affiliated with MIC and Princes, TPC significantly delayed the review by repeatedly failing to provide the Department with its Japanese sales to unaffiliated customers.

Including the November 14, 2002, letter, it required three requests, each of which was met with claims by TPC that the task was "impossible," and multiple extension requests, including an extension of the *POR7 Preliminary Results*,[152] before TPC finally reported its downstream sales in Japan. The time constraints created by these delays eventually required the Department to request a sales listing for Japan once it was discovered that TPC was reporting its sales to unaffiliated customers based on actual cases instead of on a comparable unit of measure such as 20-ounce equivalents. As stated by the Department in its April 16, 2003, letter to TPC, "{g}iven the current deadline of June 6, 2003, for the preliminary results of this review, there is now insufficient time to resolve the question of the proper comparison market and then, at a later date, to possibly request data for a new third-country market. Accordingly, we are now requiring that you provide the Department with a complete Section B response for all of your sales to unaffiliated customers in Japan and a revised Section A chart of the

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[150] At the time of TPC's filing of its TPC-Only Section A Response, the Department had yet to issue its *POR6 Final Results* in which TPC challenged the Department's *POR6 Preliminary Results* that found TPC affiliated with both MIC and Princes.

[151] We note, however, that the Department had most recently concluded that the two companies were affiliated with TPC in the *POR6 Preliminary Results* and the TPC should have sought the Department's advice on how to proceed.

[152] *See* Memorandum from Charles Riggle, Program Manager, Office 5, to Gary Taverman, Acting Deputy Assistant Secretary, concerning an Extension of Time Limit for Preliminary Results of Review, dated March 20, 2003.

quantity and value of sales to the United States and each of your largest third-country markets on a 20-oz. equivalent basis." TPC failed to provided either.

TPC severely disrupted the progress of this review with its repeated failure to provide the Department with its sales to unaffiliated customers in Japan. Moreover, by failing to provide its sales listing for Japan and its volume and value of sales on a 20-ounce equivalent basis, or in the alternative, to request a modification of the form and manner of reporting, TPC withheld information, failed to respond to Departmental requests in a timely manner, and impeded this review, under section 776(b) of the Act.[153]

Comment 20b: TPC's Sales to Unaffiliated Customers In Japan

TPC claims that in responding to the Department's request for a listing of its unaffiliated sales in Japan, it was "physically unable to provide the requested information within the requested time frame or any reasonable extension thereof, not unwilling to do so or purposely withholding data."[154] TPC argues that if the Department is determined to apply facts available in the final results, then it should do so without an adverse inference because TPC was unable to comply with the Department's request for the following reasons: (1) TPC has a large number of affiliates in Japan which keep their own invoicing records and many of which have never been required to supply the Department with volume and value data; (2) midway through the POR there was a consolidation between two of the MC affiliates which would necessitate compiling their portion of the sales listing by hand; (3) at Ryoshoku and RKG, affiliated resellers of MC, specific invoice data are available for only half of the POR due to a company policy of removing such data on a 13-month rolling basis; (4) many of the affiliates would have to compile their portion of the sales listing by hand due to the lack of a computerized sales data system; (5) the complex movement of goods and reselling of CPF between affiliates would make untangling the movement expenses and inventory carrying costs an "unmanageable task"; (6) MC moved its offices in May 2002, and at the time of the Department's request, the relevant documents were packed in boxes for the move; (7) during the time of the Department's request there was a traditional week-long Japanese holiday; (8) TPC and its Japanese affiliates did not know until late in the proceeding that they would be required to provide the Department with a sales listing.

TPC also argues that, for the above reasons, the one-week deadline set by the Department for TPC to provide its sales listing for Japan was "manifestly unreasonable."[155] Consequently, TPC claims that it should be excused for not requesting an extension to comply with the Department's request for a listing of its sales in Japan because, by setting a one-week deadline for providing the requested information, the Department "strongly implied" that any extension granted would be days and not the months that would have been needed to comply. TPC claims that it fully complied with all of the Department's

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[153] *See POR7 Preliminary Results* at 38294, 38295.

[154] TPC's Case Brief at 26.

[155] *See id*.

requests for information except for its request for a Japanese sales listing. Thus, TPC argues that if the Department decides to apply facts available in its final results, it should do so without an adverse inference.

The petitioners argue that TPC was put on notice through its correspondence with the Department that the selection of the appropriate third-country comparison market was the primary issue in this case and that TPC wasted valuable time by "persisting that the Netherlands was the correct market based on non-comparable 'standard' case volumes."[156] The petitioners go on to argue that TPC was granted extensions of time so that it could provide the Department with the requested data and that, during that time, it should have been preparing for the possibility that Japan would be selected as the appropriate comparison market. Finally, the petitioners claim that if TPC realized that it would have problems providing the Department with a sales listing for Japan as requested, it should have proposed modifying the "requested form and manner" pursuant to section 782(c) of the Act, so that it could comply with the Department's requests.[157]

Department's Position:

On April 16, 2003, the Department sent a letter to TPC making two separate but equally important requests: (1) that it provide the Department with a Section B sales listing for Japan; and (2) that it provide its volume and value of sales in each of its three largest third-country markets on a 20-ounce equivalent basis. TPC provided neither. As stated in the Department's *POR7 Preliminary Results*, because of TPC's failure to provide the Department with the requested information and the importance of that information to our dumping calculation, the Department had to resort to facts otherwise available pursuant to section 776(a)(2) of the Act.[158] Also, as stated in the Department's *POR7 Preliminary Results*, the above reasons given by TPC for failing to respond are inadequate because TPC knew from the beginning of this review that Japan was a potential comparison market and, as such, it was TPC's responsibility to "ensure that its affiliates would gather and retain any necessary documentation in an accessible format."[159] As stated by the United States Court of the Appeals for the Federal Circuit during its discussion of section 776(a) of the Act in *Nippon Steel Corp. v. United States*, 337 F.3d 1373 (Fed. Cir. 2003) (*Nippon Steel*), "{t}he focus of subsection (a) is respondent's failure to provide information. The reason for the failure is of no moment. The mere failure of a respondent to furnish requested information -- for any reason -- requires Commerce to resort to other sources of information to complete the factual record on which it makes its determination." Therefore, TPC's failure to respond to just one of the Department's two requests was sufficient to warrant the use of facts available.

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[156] Petitioners' TPC Case Brief at 8.

[157] *See* Petitioners' TPC Case Brief at 9. *See also* Section 782(c) of the Act.

[158] *See POR7 Preliminary Results* at 38294, 38295.

[159] *Id*. at 38295.

In regard to the use of an adverse inference, section 776(b) of the Act states that the Department may use an adverse inference if "an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information. . . ." In *Nippon Steel*, the Court set out two requirements for drawing an adverse inference under section 776(b) of the Act. First, the Department "must make an objective showing that a reasonable and responsible importer would have known that the requested information was required to be kept and maintained under the applicable statutes, rules, and regulations."[160] Next the Department must "make a subjective showing that the respondent . . .has failed to promptly produce the requested information" and that "failure to fully respond is the result of the respondent's lack of cooperation in either: (a) failing to keep and maintain all required records, or (b) failing to put forth its maximum efforts to investigate and obtain the requested information from its records."[161] TPC's failure to respond in this case clearly meets these standards.

TPC's failure to provide the Department with its volume and value of sales on a 20-ounce equivalent basis, or some other comparable unit of measure, meets the requirements set forth in *Nippon Steel*. As discussed in the Department's *POR7 Preliminary Results*,[162] TPC failed to provide the Department with its sales on a 20-ounce equivalent basis, or some other comparable unit of measure, despite having done so in previous reviews, and failed to offer an alternative means of reporting on a comparable unit of measure. Given that this is the seventh review in this proceeding, and TPC has provided the Department with this information in each of the previous reviews in which it participated, it was aware that the Department required this information to make a determination as to the appropriate third-country comparison market under section 351.404(e) of the Department's regulations. Therefore TPC's failure to respond, failure to propose an alternative comparable unit of measure, or failure to request an extension so that it could reply, can be described both as a failure to maintain the appropriate records in this segment and a failure to exert the effort needed to obtain the requested information.

Similarly, TPC's failure to provide the Department with a listing of its sales to unaffiliated customers in Japan meets the requirements set forth in *Nippon Steel*. Question 1(e) in Section A of the Department's questionnaire requires a respondent that does not have a viable home market for the foreign like product, to submit volume and value information for each of its three largest third-country markets. The Department then conducts an analysis under section 351.404(e) of the Department's regulations to determine the appropriate third-country comparison market. A reasonable and responsible respondent would know that it might have to provide a sales listing for any of its three largest third-country markets. In this case, not only has TPC not provided the Department with requested information, but as stated above, its reasons for not doing so are primarily due to its failure to keep and maintain all relevant documentation. In addition, TPC failed to put forth its maximum effort

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[160] *Nippon Steel*, at 337 F.3d at 1382.

[161] *Id*.

[162] *See POR7 Preliminary Results* at 38294, 38295.

to obtain the information by neither requesting an extension of the reporting deadline so that it could attempt to comply with the Department's request, nor proposing an alternative method or manner in which it could comply.

In regard to the one-week deadline set by the Department for TPC to provide its volume and value of sales on a 20-ounce equivalent basis, the Department disagrees with TPC that it was "manifestly unreasonable." As argued by the petitioners, TPC was aware from early on in this review that choosing the appropriate third-country comparison market was the primary issue in this case and that the choice was between the Netherlands and Japan. TPC should therefore have been prepared to provide a sales listing for Japan if the Netherlands was not selected. Also, as detailed in the Department's *POR7 Preliminary Results*,[163] Comment 20a, and as argued by the petitioners, TPC impeded progress of this review by repeatedly failing to provide the Department with its volume of sales in Japan to unaffiliated customers. This delay resulted in the initial one week deadline set by the Department due to the impending *POR7 Preliminary Results.* Next, the Department finds it difficult to reconcile TPC's argument that the deadline was "manifestly unreasonable" with TPC's statements that it was "unable to comply with the Department's request, even within any foreseeable extension of the current deadline,"[164] and that it "came reluctantly to the conclusion, when asked by the Department to supply a full third-country sales listing for Japan, that it would be unable to do so and that it would be futile to seek extensions of time in which to provide such a sales listing."[165] Finally, as pointed out by the petitioners, if TPC was unable to report its sales in Japan in the "form and manner" requested, then it should have proposed an alternate method of reporting rather than not responding because it felt that the Department "implied" that it would not grant adequate extensions.

Comment 20c: TPC's Reporting of Its Volume of Sales In Actual Cases

TPC argues that the Department erred in finding that it did not disclose in a timely manner that it was changing its method of reporting its volume and value of sales from a 20-ounce equivalent case basis to actual cases. TPC argues that the Department should have been aware of the change because TPC's chart of its volume and value of sales, submitted as part of its Combined Section A response of November 22, 2002, reported the unit of measure as "cases" rather than "20 oz. equivalents" as TPC had reported in previous reviews. TPC also claims that a comparison of database fields in its TPC-Only Section B-D response filed November 8, 2002, with the volume and value chart submitted in Section A "plainly shows that TPC was reporting actual cartons." Finally, TPC argues that the Department verified TPC's volume and value of sales in Japan on an actual case basis and should have been put on notice at that point.

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[163] *See id*. at 38292-38294.

[164] TPC's Case Brief at 24.

[165] *Id*. at 26.

The petitioners argue that TPC ignored the Department's instructions in the questionnaire that requires respondents to notify the Department of any methodological changes made from previous reviews and to report their quantity of sales using a uniform unit of measure.[166] The petitioners also argue that they made a number of submissions premised on TPC's reporting of its volume of sales on a 20-ounce equivalent basis and that TPC failed to correct or point out this error. Finally, the petitioners claim that TPC's unreported methodological change constitutes a failure "to cooperate . . . to the best of its ability to comply with a request for information" from the Department and therefore the application of AFA to TPC is warranted.[167]

Department's Position:

The general instructions of the questionnaire issued to TPC by the Department instructed it to "identify any methodological changes you have made from your response in any previous administrative review. Also identify any reporting methodologies that you know to be not in accordance with previous Departmental decisions regarding your company."[168] As stated by the petitioners in their case brief and by the Department in its *POR7 Preliminary Results*, prior to this review it was TPC's practice to report its volume and value of sales on a 20-ounce equivalent basis; therefore, as stated above, it was TPC's responsibility to bring to the Department's attention this methodological change.[169] TPC argues that by labeling the unit of measure in its volume and value chart as "cases," it is clear that the chart was referring to actual cases. To the contrary, given TPC's past reporting practices, reporting the unit of measure as "cases" implies 20-ounce equivalent cases, not actual cases. Also, in its response to question 7(e) in its Combined Section A Response, TPC states that "{f}or purposes of comparison between equivalent units, TPC proposes to convert all sales to 24x20 oz. equivalents, as it does in its own cost accounting system."[170] TPC goes on to describe the process by which it proposed to convert its sales from actual cases to comparable units on a 20-ounce equivalent basis, including the use of the appropriate weight factors, which it included in Exhibit A-3.

TPC also claims that it should have been evident to the Department that it was reporting its volume and value of sales in actual cases through a comparison of a single database field submitted as part of its TPC-Only Section B-D Response to its Section A volume and value chart and by the Department's verification of TPC's volume and value of sales in Japan. We disagree. The Department never received a Section A response from TPC properly reporting its volume and value of sales on a comparable unit basis. Thus, given that it may have been required to submit a new Section B response

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[166] *See* Petitioners' TPC Case Brief at 11.

[167] *See id*. at 12. *See also* Section 776(b) of the Act.

[168] General Instructions of Department's Questionnaire at G-7.

[169] *See* Petitioners' TPC Case Brief at 11. *See also POR7 Preliminary Results* at 38294.

[170] TPC's Combined Section A Response at 48.

if Japan was selected as the proper third-country comparison market, the Department had not yet conducted a full analysis of TPC's Section B-D response. More importantly, it is not the Department's responsibility to scour respondent submissions, comparing one submission to the next and to submissions in previous reviews to determine if a methodological change has taken place. The general instructions of the Department's questionnaire put the responsibility on the respondent to notify the Department of any methodological changes.

Comment 21: Appropriateness of the Margin Selected for Adverse Facts Available

TPC argues that the 51.16 percent margin assigned by the Department as the AFA rate is excessive when compared to TPC's margins in previous segments of this proceeding and does does not reasonably reflect TPC's actual rate plus an increase as a deterrent for non-compliance.[171] TPC argues that the appropriate AFA rate the Department should assign to TPC is the settlement agreement rate of 12.39 percent from the 1995-1996 review or, in the alternative, the 24.64 percent "All Other" rate from the original investigation.[172]

The petitioners claim that the AFA rate selected by the Department is not excessive given that the Department has never calculated a margin for TPC using Japan as the comparison market. The petitioners argue that the average unit values (AUVs) derived from the volume and value of sales to the United States and to Japan, as stated in TPC's October 23, 2002, TPC-Only Section A Response, indicate that the dumping margin would be at least 59.21 percent if Japan were selected by the Department as the appropriate third-country comparison market. Finally, the petitioners note that the 51.16 percent rate assigned to TPC by the Department has previously been sanctioned by the Court of International Trade (CIT) for another producer/exporter in this proceeding.[173]

Department's Position:

As we stated in our *POR7 Preliminary Results*, "in an administrative review, if the Department chooses as total AFA a calculated dumping margin from a prior segment of the proceeding, it is not necessary to question the reliability of the margin for that time period. With respect to the relevance aspect of corroboration, however, the Department will consider information reasonably at its disposal as to whether there are circumstances that would render a margin inappropriate."[174] Moreover, the

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[171] TPC's Case Brief at 30 (citing *F.Lii De Cecco di Filippo Fara S. Marino S.p.A. v. United States*, 216 F.3d 1027, 1032 (Fed. Cir. 2000), in which the court stated that "{i}t is clear from Congress's imposition of the corroboration requirement in 19 U.S.C. § 1677e(c) that it intended for an AFA rate to be a reasonably accurate estimate of the respondent's actual rate, albeit with some built-in increase intended as a deterrent to non-compliance").

[172] *See id*. at 31.

[173] *See Kompass Food Trading Int'l v. United States*, Slip Op. 2000-90 (CIT, July 31, 2000).

[174] *See POR7 Preliminary Results* at 38295.

courts have stated that "[p]articularly in the case of an uncooperative respondent, Commerce is in the best position, based on its expert knowledge of the market and the individual respondent, to select adverse facts that will create the proper deterrent to non-cooperation with its investigations and assure a reasonable margin."[175] With respect to the relevance of the adverse rate selected, "by requiring corroboration of adverse inference rates, Congress clearly intended that such rates should be reasonable and have some basis in reality."[176] Analyzing the facts available on the record in this review, we find that the circumstances of this case support the application of the 51.16 percent AFA margin used in the *POR7 Preliminary Results* to TPC in the final results of this review.

As mentioned previously, from early on in this review, the primary issue in this case has been whether the Netherlands or Japan was the appropriate third-country comparison market.[177] TPC's failure to provide the Department with its volume of sales in Japan on a 20-ounce equivalent basis and a listing of its sales in Japan prevented the Department from conducting the analysis necessary for selecting the proper comparison market for this review and forced the Department to apply AFA. Therefore, given TPC's refusal to provide the Department with the appropriate information regarding its sales to Japan, the AFA rate assigned by the Department should necessarily reflect the possibility that Japan would have been selected as the appropriate third-country comparison market if TPC would have cooperated in this review.

TPC notes that its highest margin in any previous segment of this proceeding was 12.39 percent. However, we agree with the petitioners that given that none of TPC's previous margins was calculated using Japan as a third-country comparison market, those margins do not necessarily reflect what TPC's margin might have been in this review if Japan were selected as the proper third-country comparison market. In fact, an analysis of TPC's Japanese sales data on the record in this review indicates that the 51.16 percent AFA rate assigned by the Department to TPC in the *POR7 Preliminary Results* is appropriate given the range of possible margins that may have been calculated for TPC if Japan had been selected as the third-country comparison market.[178] Consequently, based on an analysis of these data, TPC would likely benefit from its lack of cooperation if the Department were to assign it either its previous highest rate or even the "All-Other" rate.[179] In addition, the 51.16 percent itself is a calculated rate for a respondent in a previous segment of this proceeding. Finally, its use as an AFA rate in this proceeding was previously upheld by the Court of International Trade in *Kompass Food Trading Int'l v. United States*, Slip Op. 2000-90 (CIT, July 31, 2000). We therefore find that the AFA rate of

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[175] *F.Lli de Cecco Di Filippo Fara S. Martino S.p.A v. United States*, 216 F.3d 1027, 1032 (Fed. Cir. 2000).

[176] *Id.* at 1034.

[177] *See POR7 Preliminary Results* at 38292.

[178] *See* Analysis Memorandum for Thai Pineapple Canning Industry Corp., Ltd. (November 10, 2003) for a discussion of relevant proprietary data that cannot be included in this public document.

[179] *See Stainless Steel Plate in Coils from Belgium: Final Results of Antidumping Duty Administrative Review*, 66 Fed. Reg. 56272, 56274 (Nov. 7, 2001).

51.16 percent assigned to TPC in the *POR7 Preliminary Results* is the appropriate AFA rate for TPC in the final results of this review.

Comment 22: Control of TPC by MC

TPC argues that the Department erred in its *POR7 Preliminary Results* by finding that TPC is controlled by MC and that it therefore is affiliated with MIC and Princes under section 771(33)(F) of the Act. TPC acknowledges that through MC's ownership of TPC stock, it is affiliated with MC within the meaning of section 771(33)(E) of the Act.[180] Similarly, TPC does not dispute that MIC and Princes are either wholly owned by MC or an MC subsidiary, and therefore controlled by MC under section 771(33)(F) of the Act.[181] TPC does, however, argue that although TPC and MC are affiliated, since a March 2000[182] restructuring of their corporate relationship, MC has lacked control over TPC within the meaning of section 771(33)(F) of the Act. Consequently, TPC argues that common control by MC, which is required to find TPC affiliated with MIC and Princes under section 771(33)(F) of the Act, is absent.

First, TPC argues that although MC is a large customer, its sales to MC and MC's affiliates worldwide, including sales through entities controlled by MC in the United States, are not large enough to give MC control over TPC.[183] Second, on the issue of MC's control over TPC, TPC argues that the Department's findings in the previous review are inconsistent with the Department's prior precedent. TPC argues that the fact pattern in *Certain Cold-Rolled Flat-Rolled Carbon-Quality Steel Products from Brazil*, 65 Fed. Reg. 5554, 5566 (February 4, 2000) (*Brazilian Steel*) is "virtually identical" to the facts in this review, in that both cases involve one entity that has ties to two other entities in the form of members on the boards of directors and shared ownership. In *Brazilian Steel*, TPC notes that CVRD owned shares of both CSN and USIMINAS and appointed two members to the board of directors of USIMINAS, one of which was CVRD's CEO. CVRD's CEO also sat on the board of directors of CSN. TPC argues that, given these facts, in *Brazilian Steel* the Department did not find that CVRD controlled USIMINAS and, likewise in this review, the Department should find that these same factors do not indicate that MC controls TPC. Finally, TPC states that in *Brazilian Steel* there was a long-term supply relationship between CVRD and USIMINAS, just as there is a supply relationship between MC and TPC. Because the Department found that no common control existed between CVRD, CSN, and USIMINAS in *Brazilian Steel*, TPC argues that in the current administrative review the Department should find TPC not affiliated with MIC and Princes, under

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[180] *See* TPC's Case Brief at 36.

[181] *See id*. at 31, 32 and footnote 59.

[182] *See id*. at 33. *See also* TPC's Combined Section A Response at 2-9.

[183] *See* TPC's Case Brief at 34 and 35.

section 771(33)(F) of the Act, due to a lack of control by MC over TPC.[184] Much of TPC's support for its arguments is proprietary and is therefore discussed further in the analysis memorandum.

The petitioners did not comment on this issue.

Department's Position:

Section 771(33) of the Act states that affiliated persons include:

(A) Members of a family, including brothers and sisters (whether by whole or half blood), spouse, ancestors, and lineal descendants;
(B) Any officer or director of an organization and such organization;
(C) Partners;
(D) Employer and Employee;
(E) Any person directly or indirectly owning, controlling, or holding with power to vote, 5 percent or more of the outstanding voting stock or shares of any organization and such organization;
(F) Two or more persons directly or indirectly controlling, controlled by, or under common control with, any person;
(G) Any person who controls any other person and such person.

For purposes of this paragraph, a person shall be considered to control another person if the person is legally or operationally in a position to exercise restraint or direction over the other person.

The legislative history makes clear that the statute does not require majority ownership for a finding of control.[185] Rather, the statutory definition of control encompasses both legal and operational control. A minority ownership interest, examined within the context of the totality of the evidence, is a factor that the Department considers in determining whether one party is legally or operationally in a position to control another.[186]

Moreover, persons may be either individual entities or groups, and multiple persons may control,

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[184] *See* TPC's Case Brief at 37.

[185] The SAA states that: "[t]he traditional focus on control through stock ownership fails to address adequately modern business arrangements, which often find one firm operationally in a position to exercise restraint or direction' over another even in the absence of an equity relationship." *See* SAA at 838.

[186] *See Notice of Final Results of Antidumping Duty Administrative Review: Certain Cut-To-Length Carbon Steel Plate From Brazil*, 62 FR 18486, 18490 (April 15, 1997); *see also* 19 C.F.R. 351.102(b).

individually and jointly, one or more entities.[187] Additionally, evidence of actual control is not required for a finding of affiliation within the meaning of section 771(33) of the Act; it is the ability to control that is at issue.[188]

The Department has stated that merely identifying "the presence of one or more of these or other indicia of control {as per section 771(33) of the Act} does not end our task."[189] The Department is compelled to examine all indicia, in light of business and economic reality, to determine whether they are evidence of control. In determining whether control over another person exists, within the meaning of section 771(33) of the Act, the Department will consider the following factors, among others: corporate or family groupings; franchise or joint venture agreements; debt financing; and close supplier relationships. However, the Department will not find affiliation on the basis of these factors unless the relationship has the potential to impact decisions concerning the production, pricing, or cost of the subject merchandise or foreign like product.[190]

For the final results of this review, we find that TPC, MIC, and Princes are under the common control of MC, and therefore affiliated, under section 771(33)(F) of the Act. As TPC concedes in its case brief, MIC is wholly owned by MC and Princes is wholly owned by Princes Ltd., which, in turn, is also wholly owned by MC.[191] Therefore, under sections 771(33)(E) and (F) of the Act, MIC and Princes are both affiliated with and controlled by MC. In addition, we find that Chicken of the Sea International (COSI) is directly controlled by MIC under section 771(33)(G) of the Act through its Master Distribution Agreement with MIC and, consequently, also affiliated with TPC under section 771(33)(F) of the Act.[192]

As previously mentioned, TPC concedes that it is affiliated with MC under section 771(33)(E) of the Act through MC's ownership of TPC's stock.[193] However, we also find that TPC is controlled by MC under section 771(33)(F) of the Act. Even though MC's equity ownership in TPC has decreased since the March 2000 restructuring, its equity position was significant during the POR and it continues to have

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[187] *See Notice of Final Results of Antidumping Duty Administrative Review: Certain Welded Carbon Steel Pipes and Tubes From Thailand*, 62 FR 53808, 53815 (October 16, 1997).

[188] *See also Proposed Rules*, 61 FR 7308, 7310 (February 27, 1996).

[189] *See* 61 FR 7310 (February 27, 1996) Antidumping Duties; Countervailing Duties. Notice of proposed rulemaking and Request for Public Comments.

[190] *See* Section 351.102 (b) of the Department's regulations.

[191] *See* TPC's Case Brief at 31 and 32. *See also* TPC's Combined Section A Response at 2.

[192] *See* Analysis Memorandum for Thai Pineapple Canning Industry Corp., Ltd. (November 10, 2003) for a discussion of relevant proprietary data that cannot be included in this public document.

[193] *See* TPC's Combined Section A Response at 5.

representation on TPC's board of directors. Also, as the facts on the record in this review indicate, TPC is dependent upon MC's business as a substantial buyer of TPC's CPF through its wholly owned subsidiaries MIC and Princes and through its affiliate COSI.[194] Taken together, these factors give MC the potential to control TPC and to affect the price, production, and other decisions impacting the subject merchandise.[195]

TPC cites *Brazilian Steel* as support for its position that MC does not control TPC. We do not believe that the facts of that case are similar to the facts in the current review. When determining whether or not parties are affiliated, the Department may consider other circumstances, not just the equity ownership. One way to find affiliation under section 771(33)(F) of the Act is to find that two or more parties are under the common control of another party. In *Brazilian Steel*, the Department found that CVRD did not control USIMINAS and, therefore, it could not exercise common control over both CSN and USIMINAS within the meaning of subsection (F). In this case not only is there significant equity ownership and board membership as there was in *Brazilian Steel*, but there is also a dependence by TPC on MC's business for its economic success, which was absent in *Brazilian Steel*.

VI. GENERAL ISSUE

Comment 23: Assessment Rates

Malee argues that the Department incorrectly calculated its assessment rates in the *POR7 Preliminary Results.* According to Malee, the Department separately calculated the assessment rates for each unaffiliated customer of its affiliated U.S. importer. According to Department regulations, it points out, the Department should calculate an assessment rate for each importer of subject merchandise covered by the review.[196]

Department's Position:

It is our practice to calculate an assessment rate for each importer of subject merchandise covered by the review. As such, we will correct the programs for the all respondents where we calculated assessment rates for customers and not importers, accordingly. *See* each respondent's analysis memorandum dated concurrently with this decision memorandum.

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[194] *See* Analysis Memorandum for Thai Pineapple Canning Industry Corp., Ltd. (November 10, 2003) for a discussion of relevant proprietary data that cannot be included in this public document.

[195] *See* Analysis Memorandum for Thai Pineapple Canning Industry Corp., Ltd. (November 10, 2003) for a discussion of relevant proprietary data that cannot be included in this public document.

[196] *See* section 351.212(b)(1) of the Department's regulations.

Recommendation

Based on our analysis of the comments received, we recommend adopting the above positions. If this recommendation is accepted, we will publish the final results in the *Federal Register*.

AGREE____ DISAGREE____

_____
James J. Jochum
Assistant Secretary
for Import Administration

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Date